RECEIVED

AUG 20 2003

GENERAL COUNSEL
OF COPYRIGHT

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

ORIGINAL

In the Matter of **Distribution of the 1998 and 1999 Cable Royalty Funds**	**Docket No. 2001-8 CARP CD 98-99**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE JOINT SPORTS CLAIMANTS

Robert Alan Garrett
James L. Cooper
Christopher Winters
Michele T. Dunlop

ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
(202) 942-5000

Of Counsel:

Thomas J. Ostertag
Senior Vice President and General Counsel
Office of the Commissioner of Baseball
245 Park Avenue
New York, NY 10167

Philip R. Hochberg
Piper Rudnick
901 Fifteenth Street, NW Suite 700
Washington, DC 20005

Ritchie T. Thomas
Squire, Sanders, & Dempsey LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004

August 20, 2003

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ADI	Area of Dominant Influence
BBC	Browne, Bortz & Coddington
BBDO	Batten, Barton, Durstine & Osborn
Bortz Media	Bortz Media and Sports Group
Bortz Media	Bortz Media & Sports Group
CARP	Copyright Arbitration Royalty Panel
CDC	Cable Data Corporation
CFL	Canadian Football League
CRT	Copyright Royalty Tribunal
DBS	Digital Broadcast Satellite
DSE	Distant Signal Equivalent
ELRA	East Lansing Research Associates
Ex.	Exhibit
FCC	Federal Communications Commission
JSC	Joint Sports Claimants
MLB	Major League Baseball
MPAA	Motion Picture Association of America
MSO	Multi-System Operator
NAB	National Association of Broadcasters
NBA	National Basketball Association
NCAA	National Collegiate Athletic Association
NCTA	National Cable Television Association
NFC	National Football Conference
NFL	National Football League

NPS	National Programming Service
PFOF	Proposed Findings of Fact
PBS	Public Broadcasting Service
PS	Program Suppliers
PTV	Public Television, Public Television Claimants
RSN	Regional Sports Networks
Tr.	Transcript
W.D.T.	Written Direct Testimony
WNBA	Women's National Basketball Association
W.R.T.	Written Rebuttal Testimony

NOTE ON CITATION FORMAT

Citations to material designated into the record by the Joint Sports Claimants will adhere to the following format:

* Designated testimony will begin with the year of the proceeding in which it was introduced. Thus, a citation to the transcript in the 1983 Proceeding will read "**1983 Tr.**"
* If it is not a transcript citation, it will identify the witness by last name, e.g. "1990-92 **Fuller W.D.T.**" indicating that the citation is to John Fuller's written direct testimony in the 1990-92 Proceeding.
* Each citation will then identify whether the testimony was designated as a part of the Direct or Rebuttal case, the case Volume and the Tab at which the designated testimony or exhibits appear. According, a piece of testimony in Volume 2 of the JSC Direct Case at Tab 10 would be cited as "1990-92 Reid W.D.T. at [page] **(D2:10)**

Introduction and Summary

INTRODUCTION AND SUMMARY

This proceeding requires the CARP to allocate among six groups of copyright owners the 1998 and 1999 cable royalty funds. Cable operators paid these royalties, under Section 111 of the Copyright Act, to retransmit non-network distant signal programming during the years 1998 and 1999. The fundamental issue here is whether, and to what extent, the CARP should modify, for 1998 and 1999, the royalty awards that were made in the 1990-92 Proceeding, the last cable royalty distribution proceeding litigated by certain of the parties. The CARP, of course, must accord precedential value to the 1990-92 awards. *See* 17 U.S.C. § 802(c) (2003). But that does not mean the former awards are immutable. *See Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55659 (Oct. 28, 1996) (hereinafter, "1990-92 Librarian Determination") ("While the CARP must take account of Tribunal [and CARP] precedent, the Panel may deviate from it if the Panel provides a reasoned explanation of its decision to vary from precedent.").

The ground rules for changing past awards are clear. The CARP should consider whether there are any "changed circumstances" warranting an increase or decrease in those awards. *See Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985). "Changed circumstances" since 1990-92 include, but are are not limited to, passage of the Cable Act of 1992 and the conversion of superstation WTBS from the most widely-carried distant signal to a cable network in 1998. The CARP must evaluate the effect of all of the relevant changes during the period since the last litigated awards – changes that significantly decreased the size of the cable royalty funds and affected the relative values of the programming (and accompanying musical works) retransmitted pursuant to the Section 111 compulsory license.

In addition, the CARP must be satisfied that the past awards are reliable precedent. As the Court of Appeals has concluded,

> [I]t would be improper, as a matter of law, for the Tribunal [and now the CARP] to rely solely upon a standard of 'changed circumstances.' . . . [I]f a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal [CARP] should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence."

Id. To be sure, none of the parties wants the CARP to make wholesale changes in the CRT and CARP precedent that has been established during more than two decades of tortuous and costly litigation. A system that already imposes substantial burdens on copyright owners would become completely unworkable if established precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly – simply because new decision-makers had different views or different personal preferences of the intrinsic worth of certain programming. Nevertheless, the Court of Appeals has made clear that the CARP must determine whether, on the record before it, the CARP's conclusions in the 1990-92 Proceeding are wrong, regardless of whether circumstances have changed during the years since the last litigated awards.

For the reasons discussed below, JSC believes that its awards for 1998 and 1999 should be significantly increased over their 1990-92 level – to reflect both changed circumstances and record evidence demonstrating that prior CARP conclusions are incorrect or no longer valid. The awards of PBS, NAB and Music should be decreased and the Canadians' award should be increased. First, JSC proposes the following 1998-99 awards for the Phase I categories of distant signal programming, prior to deduction of the award to Music and after according NPR its settlement share of 0.18% of all 1998 and 1999 funds:

JSC
1998 AND 1999
Recommended Awards For Programming Claimants
Prior To Deduction For Music Award

Claimant	1998 Basic Fund (%)	1998 3.75% Fund (%)	1999 Basic Fund (%)	1999 3.75% Fund (%)
JSC	36.6%	39.9%	38.3%	42.2%
NAB	5.0%	5.0%	5.1%	5.1%
PTV	3.4%	0.0%	3.4%	0.0%
Canadians	1.6%	0.15%	1.8%	0.37%

Second, the Panel should award Music 2% of the 1998 and 1999 Basic and 3.75% Funds and should adjust the shares of each of the Phase I programming claimants to account for Music's share. That adjustment should be made for each claimant based on record evidence of the value of music to that claimant's programming. The Panel should not deduct more than 11.9% percent of the Music award in 1998 (0.2 percentage points of a 2% Music award) and 12.5% percent of the Music award in 1999 (0.2 percentage points of a 2% Music award) from the JSC share of the Basic and 3.75% Funds.

Third, the Panel should allocate to the Devotional Claimants 1.19375% of the 1998 and 1999 Basic Funds and 0.90725% of the 1998 and 1999 3.75 Funds. The award to the Devotionals is based solely upon a settlement and stipulation and not record evidence and should not be considered precedential. Fourth, JSC does not seek any portion of the 1998-99 Syndex Funds; nor does it propose any particular allocation of those funds. Finally, JSC are not proposing any specific awards for the Program Suppliers in this proceeding.[1]

1. **The CARP Should Allocate The 1998 and 1999 Cable Royalties Based On The Relative Market Values Of The Compensable Programming**

Congress did not intend that the Section 111 compulsory license deprive any copyright owner of the "relative copyright payment which [it] would have received in a free marketplace." *1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63,037 (Sep. 23, 1980) (hereinafter "1978 CRT Determination"). The CRT thus attempted to "simulate market valuation" in each of the cable royalty distribution proceedings that it conducted. *See 1989 Cable Royalty Distribution Proceeding*, 1989 CRT Determination, 57 Fed. Reg. 15286, 15288 (Apr. 27, 1992) (hereinafter "1989 CRT Determination"). The Court of Appeals approved the market value standard as the basis for allocating cable royalties, noting that the CRT "should rely, as it has in the past, on marketplace criteria. . . ." *See NAB v. CRT,* 772 F.2d at 939.

After reviewing past precedent and relevant legislative history, the CARP in the last litigated Phase I cable royalty distribution proceeding correctly concluded that:

> "[M]arket value" is the only logical and legal touchstone.
>
> Ultimately, the question is, what would the cable system operators have had to pay [on a proportional basis] in an open market for the sports, movies and other categories of programming that existed in the years 1990 through 1992.

Report of the Panel in Docket No. 94-3 CARP CD 90-92 at 23 & 24 (May 31, 1996) (hereinafter "1990-92 CARP Report"). The Librarian affirmed the CARP's decision to

[1] Several years ago, JSC and Program Suppliers entered into agreements settling controversies over the 1992-2000 satellite royalty funds, the 1993-2000 cable royalty

Footnote continued on next page

"emphasize[] the marketplace value criteria." 1990-92 Librarian Determination, 61 Fed. Reg. at 55658; *see also* 1993-97 Librarian's Phase II Final Determination, 66 Fed. Reg. 66433, 66,445 (Dec. 26, 2001) ("The established distribution criteria, as modified, must be applied in an effort to simulate a marketplace for these programs where one does not exist because of section 111."). And the Court of Appeals affirmed the CARP and Librarian's use of the market value standard as a basis for rejecting "harm" as a separate criterion for royalty distribution. *See Nat'l Ass'n of Broadcasters v. Librarian of Congres*s, 146 F.3d 907, 927-28 n.18 (D.C. Cir. 1998).

As in prior proceedings, the CARP in this proceeding should allocate the 1998-99 royalties according to the relative market value of the different program categories. In doing so, the CARP should determine the relative value of *only* the non-network distant signal programming that cable operators actually retransmitted during the years 1998 and 1999 – not the value of programming that cable operators could have carried, but chose not to carry, on a distant signal basis. That approach is mandated not only by the record in this case (*see* paragraphs 97-105 *infra)* but also by law. *See* 17 U.S.C. § 111(d)(3)(A) (copyright owners may receive Section 111 royalties only for non-network programming retransmitted on a distant signal basis); H.R. Rep. No. 94-1476, at 97 (1976) (Section 111 royalties may not be awarded for network programming or programming retransmitted on a local basis only).

Footnote continued from previous page
funds and related matters. Consistent with those agreements, JSC is not proposing any findings or conclusions concerning Program Suppliers.

2. **The CARP Should Use The Bortz Survey Results As The Starting Point For Determining Relative Market Values And Should Depart From Those Results Only Where There Is A Substantial Record Basis For Doing So**

(a) In the current and past distribution proceedings, other parties have proposed a variety of disparate and often conflicting approaches for determining relative market value. Indeed, NAB alone has offered or supported no less than eight different studies in the seven litigated proceedings. *See* Tr. 1898-1907 (Ducey). Similarly, PBS is offering a time study in this proceeding that, had it been offered in earlier proceedings, would have supported PTV awards much lower than what PTV sought and received. *See* Tr. 3755-74 (Johnson). JSC, however, has consistently urged the CRT and the CARP to rely on the values that the cable operators themselves attach to the compensable programming – as reflected in statistically-valid "constant sum" surveys where cable operators are asked how they would have allocated programming budgets for the non-network distant signal programming they actually carried during the relevant time period.

JSC has submitted such survey evidence in each of the cable royalty distribution proceedings dating back to the very first such proceeding in which the CRT allocated the 1978 royalty fund. The earliest studies (for the years 1979-80) were designed and conducted by the research department of Batten, Barton, Durstine & Osborne, which at the time was one of the largest advertising agencies in the country. Bortz Media and Sports Group and its predecessors ("Bortz") have been responsible for all of the surveys beginning with the 1983 survey. Bortz, is a leading market research firm that specializes in the cable television and new media industries and has served as an advisor to several of the largest cable operators, broadcast and cable networks, sports leagues and teams and public television. Bortz also utilized the services of nationally-recognized experts in survey research to assist in the design of the surveys and separate survey research firms to conduct the surveys. While the surveys have continuously been refined and improved in response to issues raised by the CRT, CARP and various experts, the basic approach has remained constant for over twenty years. *See* paragraphs 9-37 *infra*.

As the Court of Appeals has concluded, reliance upon such cable operator surveys is "more than reasonable," particularly given "Congress' evident intent to have the Tribunal operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners." *Christian Broad. Network, Inc. v. Copyright Royalty Tribunal,* 720 F.2d 1295, 1306 (D.C. Cir. 1983) (rejecting Program Supplier challenge to JSC's 1979 constant sum survey of cable operators). It is not surprising, therefore, that parties in addition to JSC – *i.e.*, NAB, PBS and the Canadians – have submitted constant sum cable operator surveys in various cable royalty distribution proceedings. *See* paragraphs 16-23 and 34- *infra*. And in the last two such proceedings (1989 and 1990-92), NAB, PBS and the Devotionals supported the survey that JSC commissioned from Bortz Media. Indeed, "[t]he *centerpiece* of the cases presented by JSC, NAB, PBS and the Devotionals [were] the Bortz surveys." 1990-92 CARP Report at 26 (emphasis added).

(b) The primary focus of the 1989 and the 1990-92 Proceedings was on the weight to be accorded the Bortz surveys versus the Nielsen studies, which measured the relative amount of time that households viewed distant signal programming. *See* 1989 CRT Determination, 57 Fed. Reg. at 15288 (1989 Proceeding "was primarily marked by arguments as to which is the best indicator of the market value of the Phase I program categories" – the Bortz studies or the Nielsen studies); 1990-92 CARP Report at 27-66 (extensive discussion of evidence related to Bortz and Nielsen studies). More than two dozen experts and cable industry executives offered testimony in those proceedings supporting the Bortz surveys. *See* paragraphs 38-45 *infra*. The witnesses – who testified on behalf of JSC, NAB, PBS and Devotionals – included survey experts, market researchers, economists, statisticians and a financial valuation expert. Their testimony established that the Bortz surveys are methodologically sound; produce results that make sense and are consistent with marketplace realities; and provide the best available estimates of the relative values that cable operators accorded the different categories of compensable distant signal programming.

Based on the record in the 1989 Proceeding, the CRT increased the weight that had been accorded the cable operator surveys (and decreased the weight that had been accorded the Nielsen studies) in prior proceedings. *See* 1989 CRT Determination, 1989 CRT Determination, 57 Fed. Reg. at 15302 (referring to the "new weight" accorded the Bortz results). The CRT found the "Bortz survey to be valid, and a key part of our determination." *Id.* at 15301. Where the Bortz results were "corroborated" with other evidence, the CRT accorded those results "substantial weight." *Id.* at 15301-02. The CRT, however, expressed certain "concerns" with the survey that "affected [its] allocation." *Id.* at 15301.

In the 1990-92 Proceeding, the witnesses presented by JSC and other parties sought to address the CRT's concerns. Evidentiary hearings in that case consumed even more time than did the hearings in the present case. After devoting more than forty pages of its report in the 1990-92 Proceeding to analyzing the Bortz and Nielsen studies, the CARP agreed that the weight accorded the Bortz surveys should be increased further (and the weight accorded the Nielsen studies should again be decreased) – although the Panel split on how much weight was appropriate.

The CARP majority found that the Bortz study is "well designed," 1990-2 CARP Report at 65, and did not suggest any changes in the survey methodology. They also found that the Bortz survey "focused more directly than any other evidence to the issue presented: relative market value," *id.* at 66, explaining that:

> The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the type of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the same categories we are presented here in the form of claimant groups – that is, sports, movies, and the others. That is also what the Panel must do.

Id. at 65. Thus, the CARP majority concluded, the Bortz survey is "highly valuable in determining market value." *Id.* at 66. However, they also said that there were three conceptual "limitations" to the survey (discussed at paragraphs 54-72 below) that "precluded its acceptance in toto." *Id.*

The dissenting CARP member did not share the majority's concerns. He concluded that the Bortz survey is the best tool available for measuring relative values in the relevant marketplace and that it should receive far more weight than it does . . . " 1990-92 CARP Report at 170 (dissenting opinion). That is because the Bortz survey "focuses correctly on the cable operator as the key player, asks the economically significant question and accurately provides the best estimates of relative value in the marketplace that actually existed." *Id.* He explained that the conceptual "limitations" perceived by the majority do not provide a basis for discounting the Bortz results, noting further that:

> Most of the expert witnesses who testified agreed that the Bortz survey was correctly designed and executed and whatever shortcomings it may have are relatively minor in comparison to its attributes. In response to suggestions and official Tribunal criticism over the years, it has evolved to measure the correct variable and to provide the most accurate results of relative marketplace value.

Id. at 171.

(c) The record in the current proceeding makes clear that the concerns of the CARP majority in the 1990-92 Proceeding are not well-founded and do not provide a basis for discounting the weight to be accorded the 1998 and 1999 Bortz surveys.

First, according to the CARP majority, a "significant limitation" of the Bortz study is that it does not take account of the seller's perspective, *i.e.,* the survey asks only what the cable operator is willing to allocate to each program category and not what the cable operator would "have to spend" on that category. 1990-92 CARP Report at 65; *see also* 1989 CRT Determination, 1989 CRT Determination, 57 Fed. Reg. at 15301 (Bortz study does not take account of supply side); *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792, 12811 (Apr. 15, 1986) (hereinafter "1983 CRT Determination") (same). The dissenting CARP member dismissed the supply side criticism, concluding (among other things) that "there is no need to look at a seller's motivations or to speculate about the price that sellers would demand in a hypothetical market." 1990-92 CARP Report at 172 (dissenting opinion).

NAB, the party that is naturally most concerned about the effect of the CARP's considering seller's motivations in fashioning royalty awards, has offered testimony in the current proceeding and in prior proceedings that supply side considerations are irrelevant. *See* paragraphs 65-72 *infra*; *see also* 1990-92 CARP Report at 61 (referring to NAB, PBS and Devotional witnesses who "testified that supply side considerations are not appropriate for the Panel's task"). If NAB and the other parties, as well as the dissenting CARP member in the 1990-92 Proceeding, are correct, the CARP majority in that proceeding erred when they discounted the weight to be accorded the Bortz survey on the basis of the seller's perspective. And that error should be corrected here.

But even if the CARP in the current proceeding follows precedent and believes that the seller's perspective should be considered, that should not result in less weight being accorded the 1998 and 1999 Bortz studies. Rather, the CARP should simply adjust the Bortz results for any particular claimant to account for the supply side consideration. *See*, *e.g.*, 1989 CRT Determination, 1989 CRT Determination, 57 Fed. Reg. at 15303 (adjusting the Devotionals' Bortz share downwards to account for the fact that Devotionals, who seek to maximize viewer donations, pay broadcasters to carry Devotional programming). And, as discussed below, the CARP in this proceeding should do what the CARP majority in the 1990-92 Proceeding failed to do – articulate clearly how, if at all, the seller's perspective consideration warrants a change in the Bortz results for each claimant.

<u>Second</u>, the CARP majority in the 1990-92 Proceeding said that the "execution" of the Bortz survey was a "limitation" that affected the CARP's "confidence" in the survey, *i.e.*, that the cable operator respondents "did in ten minutes . . . what this Panel is being asked to do after considering hundreds of hours of testimony, 12,000 pages of transcripts and hundreds of pages of briefs." 1990-92 CARP Report at 66. The dissenting CARP member disagreed with this concern, stating:

> In having to make programming choices that directly impact on the ability of the cable system to stay in business, the cable operators are required to evaluate programming on a routine, full-time, professional basis. This constant exposure enables them to answer questions involving both programming and a constant sum budget on relatively short notice, and to recall the choices made without difficulty.

Id. at 170 (dissenting opinion). The record of this case demonstrates that the above views of the dissenting CARP member are valid and that the CARP should not accord any less weight to the Bortz survey on account of "execution" concerns. *See* paragraphs 55-59 *infra.*

Third, the CARP majority in the 1990-92 Proceeding stated that the Bortz study "is constrained by the inherent limitation that it is a study of attitudes" and that "all of the witnesses say that it is far better to survey conduct." 1990-92 CARP Report at 66. That concern runs directly counter to years of research showing that the constant sum methodology, a well-established market research tool, is highly predictive of marketplace behavior. *See* paragraphs 41-45 and 60-61 *infra.* In any event, that concern is undercut significantly by the analysis of actual cable operator behavior that NAB has offered in this proceeding – the Rosston regression analysis which relates cable operators' royalty payments to the different amounts and types of distant signal programming carried by those operators. While the Rosston regression analysis is itself subject to certain criticisms, that study (as NAB has acknowledged) corroborates the Bortz results. *See* pages 63-64 *infra.*

Finally, the limitations that the CARP majority attributed to the Bortz survey apply equally to the constant sum cable operator surveys sponsored by the Canadian Claimants. Nevertheless, there is nothing in the CARP's 1990-92 Report to suggest that the CARP discounted those surveys on the basis of such limitations. To the contrary, the

CARP's basic royalty award to the Canadians (1%) was virtually the same as the Canadian's survey share (56%) times the fees generated by Canadian signals (1.95%) (0.56 x 1.95 = 1.1%). *See* 1990-92 CARP Report at 136 & 140-41. Moreover, the Librarian reversed the CARP's 3.75% award to the Canadians and determined that the Canadians, Program Suppliers and JSC should each receive their survey shares (multiplied by the 3.75% fees that the Canadian signals generated). *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55663-64. It was inappropriate for the CARP to discount the Bortz cable operator results in light of perceived conceptual limitations and at the same time accord essentially full credit to the Canadian cable operator survey results.

(d) None of the other quantitative studies submitted in this proceeding provides a sounder basis than the Bortz studies for determining relative market values. Well-established precedent and the record in this proceeding make clear that the time studies submitted by NAB's Fratrik and PBS' Johnson are not measures of relative program values, as the NAB concedes. *See* paragraphs 188-195, 201-204, 208-220 *infra.* Although the Rosston regression analysis purports to measure relative values, that study (unlike the Bortz studies) has no track record of consistency, and has not been subject to scrutiny over a prolonged period, in these proceedings. Moreover, its results (while confirmatory of the Bortz results) reflect significant volatility, which is unacceptable in a proceeding where every percentage point accounts for over $2 million in 1998-99 royalties alone and substantially more in terms of precedential effect. *See* paragraphs 148-150 *infra.*

As for the Nielsen study, cable operators cannot insert advertising on distant signals. Consequently, the value of distant signal programming lies in its ability to attract and to retain subscribers and not in the relative amounts of viewing time that it generates. The CARP in the 1990-92 Proceeding concluded that the bottom-line results of the Nielsen study do not reflect relative market values – a point that Program Suppliers' own witnesses and others have acknowledged. *See* 1990-92 CARP Report at 43; *id.* at 41 & n. 164-65 (citing PBS proposed findings to the effect that the Nielsen studies failed to measure marketplace value or the benefit of distant signal programming in terms of attracting and retaining subscribers). While the CARP majority said that "actual viewing is very significant when weighed with all the other factors," they could not otherwise "quantify the Nielsen statistics as evidence of market value." 1990-92 CARP Report at 44; *see also id.* at 171 (dissenting opinion) ("As we all agree, the Nielsen study . . . is specifically designed to measure viewing, not value . . . [V]iewing has an impact on value but the evidence in the record quantifying this point is far from persuasive").

The Program Suppliers' principal experts in the current proceeding, Mr. Lindstrom of Nielsen and Dr. Gruen, likewise recognized that the bottom-line results of the viewing study do not reflect market values and need to be adjusted in order to provide some indirect measure of relative value. *See* paragraphs 171-178 *infra.* Dr. Gruen offered certain adjustments (some of which were requested by the CARP); like the Rosston study, these adjustments reflect significant variability and do not have any track record of consistency or scrutiny. The Nielsen People Meter study itself, upon which Dr. Gruen's adjustments are based, has a limited track record, having been introduced for the first time in the 1990-92 Proceeding with only the 1991 and 1992 studies being conducted for a full year; the fact that one program category (PTV) shows a 12-point change in bottom-line viewing from one period to the next also raises questions about the stability and reliability of the bottom-line data. Furthermore, the Nielsen study, like the Rosston study, also does not account for the supply side.

(e) In short, the record in this proceeding (including the incorporated testimony and new studies) support the CARP according greater weight to the Bortz studies than did the CARP majority in the 1990-92 Proceeding. The CARP should use the Bortz survey results – and not the Nielsen, Rosston, Fratrik or Johnson studies – as the starting point for determining each claimant's 1998 and 1999 awards. The CARP should depart from the Bortz results for a particular claimant only where there is a substantial record basis demonstrating that an adjustment is necessary to reflect accurately the relative market value of that claimant's programming.

3. **The Bortz Surveys Show That JSC's Award Should Be Increased To No Less Than 36.6% Of The 1998 Basic Fund And 38.3% Of The 1999 Basic Fund, Before Accounting For The Music Award**

The CARP majority in the 1990-92 Proceeding awarded JSC 29.5% of the 1991 and 1992 Basic Funds, without taking account of the royalties that the Music Claimants received pursuant to settlement. The JSC award for 1990 was slightly higher since the Canadians had settled for less in 1990 than they were awarded in 1991-92. The dissenting CARP member recommended a 30.5% award to JSC for all years. The Bortz surveys make clear that the relative value attached to JSC programming by cable operators in 1998 and 1999 was significantly higher than the CARP's 1990-92 awards to JSC.

(a) The Bortz surveys show that cable operators would have allocated 37.0% of their 1998, and 38.9% of their 1999, distant signal programming budgets for live professional and collegiate team sports telecasts – 7.5 to 9.3 percentage points more than

JSC's 1990-92 award. Sports was, by far, the most highly valued of the distant signal program categories in the 1998 and 1999 Bortz surveys. The next most highly valued program type (movies) received approximately 22% in each of the years – 15-17 percentage points less than sports. That 15-17 point margin reflects the largest margin between sports and the next most highly-valued program category in any Bortz study for a litigated year. *See* paragraphs 120-121 *infra*.

In 1998, as in prior litigated years, the JSC valuation was slightly lower than the combined allocation to the two Program Supplier categories – movies and syndicated series (37.0% for sports vs 39.7% for movies and syndicated series combined). In 1999, however, the JSC valuation exceeded the Program Supplier valuation (38.9% vs. 37.7%) for the first time ever in a Bortz survey covering a litigated year. *See* JSC Ex. 1 at 26.[2] By comparison, in the 1990-92 surveys, the Program Supplier categories garnered an average share of 42.5%, approximately 5 percentage points more than the JSC share of 37.4%. *See id.*

Furthermore, 88.1% of the cable operators in 1998, and 71.9% in 1999, stated that the sports programming on distant signals was the most popular form of distant signal programming with their subscribers. No other category was mentioned by more than 26.5% of the cable operators as the most popular form of distant signal programming. *See* JSC Ex. 1 at 13. That margin also was the widest reflected in any Bortz study for a litigated year.

[2] The Bortz Media & Sports Group Report is JSC Exhibit 1, which was attached to Mr. Trautman's sponsoring testimony.

(b) Bortz did not attempt to survey cable operators who did not carry multiple categories of distant signal programming. Consequently, JSC has acknowledged that the 1998-99 Bortz surveys do not take account of any value attributable to PTV programming on cable systems whose only distant signals were PTV signals; nor do they take account of any value attributable to programming (including JSC programming) on cable systems whose only distant signals were Canadian signals. Such systems, however, contributed only a very small portion to the total 1998 and 1999 royalty funds (less than 4% combined).[3]

Mr. Trautman offered two methods for adjusting the Bortz results to account for the PTV-only and Canadian-only cable systems – one that paralleled the approach the CARP in the 1990-92 Proceeding used in determining the Canadians' award and one that substituted the Bortz shares for PTV and Canadians with the royalty fees paid for carriage of PTV and Canadian signals. Under those methods, the value of JSC programming is no less than <u>36.6%</u> in 1998 and <u>38.3%</u> in 1999:

[3] As in prior years, Bortz also did not survey cable operators who carried no distant signals, *i.e.,* the "Zero DSE" systems. Zero DSE systems accounted for approximately 20% of the 1998 and 1999 royalties, significantly more than in prior years. *See* Bennett W.D.T. at 2-4. JSC agrees with the Canadians that the Zero DSE royalties should be allocated in the same percentage shares as the royalties paid by cable systems who carried distant signals. *See id.* at 4; *see also* 1978 CRT Determination, 45 Fed. Reg. at 63,042 (distributing unclaimed funds pro rata among claimants).

JSC Valuation In Bortz Surveys
Adjusted For PTV-Only And
Canadian-Only Cable Systems

Method	1998	1999
1990-92 CARP Approach	36.7%	38.2%
Adjustment for PTV-Only and Canadian-Only Systems Approach	36.6%	38.3%

See paragraphs 89-92 *infra*. PBS' witness Dr. Fairley also proposed certain methods to adjust for PTV-only and Canadian-only cable systems. However, Dr. Fairley's methods are improper and should be rejected. Because they are unweighted, they fail to take account of the comparatively minimal royalties paid by such systems. They also improperly assume that cable operators – including the significant number of whom carried distant PTV signals because those signals were local (and thus subject to must carry) in a portion of the cable community – would allocate 100 percent of their royalties to the distant PTV programming. *See* paragraphs 93-96 *infra.*

(c) Dr. Fairley further testified that the Bortz survey results should be adjusted to account for the fact that they did not ask cable operators to exclude from consideration certain non-compensable programming on the WGN satellite feed – programming that could not be readily identified in a survey question. Dr. Fairley's WGN adjustments improperly equate program time with program value and fail to distinguish between the different values that cable operators accord movies and syndicated programming. His adjustments also assume – contrary to fact – that none of WGN's non-compensable programming is Devotional programming. Moreover, Dr. Fairley failed to offer any explanation as to why he made the WGN adjustments in the 1998-99 survey results but not in the 1990-92 survey results when he testified in the 1990-92 Proceeding; WGN as well as WWOR had non-compensable programming in 1990-92.

Even if the CARP accepted Dr. Fairley's WGN adjustment, that adjustment would not decrease the value accorded JSC programming. Rather, it would *increase* the JSC valuations. Depending upon which of Dr. Fairley's adjustment methods is used, the JSC valuation in 1998 would range from 42.1% to 42.7%; and JSC's valuation in 1999 would range from 44.1% to 44.7%. *See* PTV Exs. 9-R and 10-R (Method 2 as minimum, Method 3, Calculation 1 as maximum).

(d) In the 1990-92 Proceeding, Dr. Fairley argued that the Bortz survey results should be adjusted to account for the fact that they did not ask any cable operator to value distant PTV programming if that cable operator carried no distant PTV signals (the so-called "Automatic Zero Issue"). Under Dr. Fairley's adjustment, the PTV valuation rose by approximately 3 percentage points, from an average of 2.9% to 6.0%. *See* 1990-92 PTV Proposed Findings at 33. JSC absorbed a proportional share of that PTV increase and thus the CARP in the 1990-92 proceeding effectively accorded JSC an average valuation in the 1990-92 Bortz studies of 36.2%, rather than 37.4%. *See* paragraph 230 *infra*.

The 1990-92 CARP was "troubled" by Dr. Fairley's adjustment. Yet the CARP reluctantly accepted it. The CARP did so because the CRT in the 1983 and 1989 Proceedings had accepted a similar adjustment and because no one had presented an alternative approach for dealing with the issue. *See* 1990-92 CARP Report at 123-24. In this proceeding, Dr. Fairley has presented two alternative approaches for dealing with the Automatic Zero Issue. The first approach, which is comparable to his approach in the

1990-92 Proceeding, accords value to programming that was not carried on a distant signal basis. That approach is contrary to law and the record. But even if it were accepted for 1998 and 1999, it would result in a significantly smaller downward adjustment in JSC's valuation than was the case in 1990-92. *See* paragraph 230 *infra.*

Dr. Fairley's new approach for dealing with the Automatic Zero Issue was designed to avoid the problems inherent in according value to programming not carried. That approach simply reduces the valuations that the cable operator respondents accorded to programming that, in Dr. Johnson's estimation, the operators likely would not have carried absent the compulsory license. Under the new approach, JSC's valuation share would actually increase to between 40.3% and 41.1% in 1998 and 42.3% and 43.0% in 1999. That is because, as Dr. Fairley concludes, few if any cable operators would discontinue carriage of the sports on distant signals. Thus, under either of Dr. Fairley's approaches, resolution of the "automatic zero" adjustment issue in this proceeding would result in a higher valuation for JSC than was the case in the 1990-92 Proceeding. *See* paragraphs 230-231 *infra.*

(e) As discussed above, none of the "limitations" that the CARP majority attributed to the Bortz surveys should provide any basis for discounting the Bortz results. In any event, these limitations do not support a downward adjustment in the values attributed to JSC programming. Certainly the CARP in the 1990-92 Proceeding did not explain how, if at all, such limitations would reduce the value accorded JSC programming disproportionate to that of any other claimant category. *Compare* 1990-92 CARP Report at 42-43 (dismissing certain methodological criticisms of Nielsen study because "none of the parties was able to articulate what effect, if any, these alleged problems had on the survey results" and because the "claimants who dispute the Nielsen survey's accuracy present no alternative evidence to viewing"). Furthermore, the record in this proceeding does not support such a reduction. To the contrary, consideration of the seller's perspective should result in a downward adjustment of the NAB and PBS valuations but not the JSC valuations. *See* paragraphs 253-258 (JSC), 299-314 (NAB) and 350- 353 (PTV) *infra.*

4. **The Other Quantitative Studies That Purport To Show Relative Market Values Corroborate The Bortz Results For JSC And Support An Increase In The JSC Awards**

(a) Dr. Rosston, on behalf of NAB, estimated that an additional minute of distant signal sports programming in 1998-99 generated more royalties than any other programming category. According to Dr. Rosston, that additional minute of sports programming resulted in an increase of $1.63 in Section 111 royalty payments by a cable systems with more than zero DSEs – approximately 10 times more than Program Supplier, the next most highly "valued" program category in the Rosston study, and approximately 25 times more than PTV programming, the least "valued" category (with a positive coefficient). *See* Rosston W.D.T. at 23. As Dr. Rosston testified, his study shows that "[s]ports is substantially more valuable" than the other programming on distant signals – a result, he said, that "makes sense." Tr. 2648 (Rosston).

To determine the "total value" of each program category, Dr. Rosston applied his per-minute values to the total amount of time occupied by each category. Dr. Rosston's analysis resulted in valuations of between 30.34% and 40.54% for JSC programming – depending upon the years examined and whether one focused on cable systems with more than zero DSEs or on systems with one or more DSEs:

Results Of Rosston Study
For JSC Programming

Year	Greater Than Zero DSE Systems	Greater Than Or Equal To One DSE Systems
1998	30.34%	35.20%
1999	36.51%	40.54%
1998-99 Combined	32.54%	36.87%

While the above values represent the best point estimates for the JSC category in Dr. Rosston's regression analysis, the confidence intervals surrounding his estimates encompass the point estimates for the JSC programming category in the Bortz studies. *See* paragraph 64 *infra*. As Dr. Rosston testified, the results of his study (for JSC and the other claimants) are similar to those of the Bortz surveys, notwithstanding the different methodologies applied by the two. *See* Tr. 2920-21 (Rosston). NAB's Dr. Ducey likewise testified that the results of the Rosston study are consistent with and corroborate the Bortz results and support an increase in the JSC award over its 1990-92 level. *See* Tr. 1890, 1896 (Ducey); *see also* Crandall W.R.T. at 3-4.

(b) The Program Suppliers' Nielsen data support JSC's request for an increased award commensurate with the Bortz results in three respects. First, in the 1990-92 Proceeding the CRT gave some weight to the relative amounts of viewing time that People Meter households devoted to the different types of distant signal programming. JSC's share of that viewing time has increased – from 6%-7% in 1990-92 to 9.0% in 1998 and 7.9% in 1999. That increase is particularly impressive because it results from an increase in viewer interest – and not from an increase in the relative amount of hours that JSC programming is made available since, as the Fratrik study shows, the relative amount occupied by JSC programming during the 1990-92 and 1998-99 periods has remained constant. *See* pages 239-242 *infra*. Of course, all parties (including Program Suppliers) have recognized that shares of viewing time, as reflected in the Nielsen study, do not equate with market value. To the extent that the CARP in this proceeding nevertheless places any weight on such viewing time data, that data show that JSC's 1998-99 awards should rise over their 1990-92 level.[4]

Second, Dr. Gruen analyzed the 1998-99 Nielsen viewing data to determine the relative popularity of the different types of programming. *See* Tr. 7593 (Gruen). By making what he termed "avidity" adjustments in the viewing data, Dr. Gruen concluded that sports programming was by far the most popular program category in 1998 and 1999. Tr. 7594-95 (Gruen). According to Dr. Gruen, the "avidity factor" for JSC programming was between 7 and 10 times higher than the "avidity" factor for any other program category. *See* Gruen W.R.T. at 38-46. Although Dr. Gruen initially limited his analysis to viewing data for one demographic group (18-49-year olds), the same conclusion concerning the popularity of JSC programming is apparent when one analyzes

[4] Viewing shares in the range of 8% to 9% are not inconsistent with the conclusions in the Bortz and Rosston studies that the relative market value of JSC programming in 1998 and 1999 exceeded 30%. As MPAA witness Dr. Gruen acknowledged and as actual marketplace data reflect, the share of total license fees that cable operators allocate to a programming service (particularly one with JSC programming) may vary significantly from the share of viewing minutes generated by that service; likewise, the share of license fees that cable networks pay for a certain type of programming (particularly JSC programming) may vary significantly from the share of viewing generated by that programming. *See* Tr. 7607-86 (Gruen). *See also* 1990-92 CARP Report at 90 (discussing Kagan report which showed that cable networks spent between 24.9% and 26.3% of their program budgets to acquire JSC-type programming that generated only 4.3% to 4.8% of those networks' viewing time); Trautman W.D.T. at 22-26 (showing that share of license fees paid by cable operators and cable networks for JSC programming exceeded share of viewing and total time).

the viewing data for all households and persons aged two and over. Thus, Dr. Gruen's "avidity" analysis helps confirm the central conclusion of the Bortz study – that JSC sports programming is the most highly valued program category. *See* paragraphs 240-242 *infra*

Finally, in an attempt to determine relative market value, Dr. Gruen adjusted the Nielsen viewing data to take account of his "avidity" factors. Dr. Gruen's initial adjustments were based on data for the 18-49-year old demographic group and a reduced avidity factor. They nevertheless reflected a JSC share of 21.3% for the years 1998 and 1999 combined – or between two and three times more than the share reflected in the original viewing study. The CARP requested that Dr. Gruen make certain alternative calculations that, among other things, were based on data for all demographic groups and used the full avidity factor. The various calculations that Dr. Gruen made reflect a wide variety of results for sports and all other categories. All of these calculations, however, show the JSC category at a share level higher than in any other Program Supplier viewing study submitted in cable royalty distribution proceedings. Furthermore, the adjustments that are based on full-year viewing data for all program categories reflect JSC shares that range from 32.3% to 47.1% and are consistent with the Bortz survey results:

Nielsen Viewing Results For JSC
(With Gruen Avidity Adjustments)
Full Year, All Demographic Data

Type	1998	1999
Mid-Point Adjustment	39.3%	32.3%
Full Adjustment	47.1%	39.0%

See paragraphs 240-242 *infra.*

5. **<u>Additional Record Evidence Corroborates The Bortz Results For JSC And Supports An Increase In The JSC Awards</u>**

(a) Several cable industry witnesses have testified in this proceeding and in prior proceedings. Virtually without exception these witnesses have confirmed that JSC sports programming is the most valuable type of programming on distant signals and that the cable industry has valued that programming at the levels reflected in the Bortz studies. *See* paragraphs 251-252 *infra.* Their testimony also helps explain why cable operators accord the value of distant signal programming to most sports:

- All of the program categories represented by the parties in this proceeding claim to have *loyal* followings. But there are simply many more loyal followers of sports programming than of any other type of programming. As the former head of the cable industry's principal trade association testified, sports fans "form the bedrock of the cable customer base" and constitute the "single largest" group of cable subscribers. Sports fans, moreover, have demonstrated their loyalty by frequently demanding that cable operators carry certain sports programming or risk losing them as subscribers ("No Cubs, No Cable"). While individuals may like certain programming, they generally do not identify with that programming in the same intense way that sports fans do.

- The parties have recognized that *live* programming and *first-run* programming are particularly valuable. Each party has thus emphasized the live programming and the first-run programming that is included in its claim. Unlike other program categories, however, *all* of the programming within the JSC category is live and first-run. While other programs are typically shown many times over (thereby increasing the amount of broadcast time and viewing time they occupy), a live sports telecast on a distant signal is shown only once, when it has peak value. Unlike most other programming, which may be shown different times on different media (and thus compensated repeatedly), sports programming is perishable; there is only a single opportunity to be compensated for a live sports telecast. Unlike most other programming, a live sports telecast is shown on a real-time basis as the sports event itself unfolds (generally during prime time or otherwise when most subscribers want programming available).

- The parties also have recognized the value of *unique* programming – programming that is available from multiple sources is not as valuable as programming that is available only on the distant signal. All of the different *types* of programming on distant signals, including sports, are available from multiple sources, such as local broadcast stations, broadcast networks and cable networks. But the particular games that are shown on a distant signal are typically available only on that distant signal and not from any other source. Thus, while a cable subscriber outside the Chicago area in 1998-99 may have access to an occasional Cubs or White Sox game on Fox or ESPN, the only way that subscriber was able to obtain access to a package of approximately 150-60 unique Cubs and White Sox games was by the cable system carrying WGN. In contrast, other non-sports programs on distant signals will often be available at one time or another, from other sources, such as local broadcast stations, cable networks or video rental stores.

See paragraphs 221-226, 251-252 *infra.*

(b) The preeminent value that cable operators attach to the major sports programming on distant signals also is reflected in the fact that the cable industry supports the Section 111 compulsory license for the principal reason of ensuring relatively inexpensive access to major sports programming. That point was made by James Mooney, the former head of the cable industry's principal trade association (NCTA), when he testified in the 1990-92 Proceeding on behalf of JSC. June Travis, who served as NCTA's Chief Operating Officer during the period 1994-1999, confirmed that the cable industry's objective in supporting compulsory licensing was the same in 1998 and 1999. *See* Travis W.D.T. 3; Tr. 1486-87 (Travis). *See* paragraphs 251-252 *infra.*

Nothing in the record of this or any prior distribution proceeding suggests that other types of programming on distant signals are sufficiently valuable to the cable industry to justify the political consequences of cable's continued support of the Section 111 compulsory license. To the contrary, commercial broadcasters have urged Congress and the Copyright Office to maintain the compulsory license, arguing that compulsory licensing is necessary to ensure access to JSC programming on distant signals (rather than access to the news and public affairs programming or other types of programming of distant signal programming). *See* paragraphs 302-314 *infra.*

The record also shows that cable operators often import particular distant signals for the primary reason of having access to the sports telecasts on those signals. *See* paragraphs 251-252 *infra.* As NAB's Mr. Alexander correctly suggested, the presence of sports on certain Philadelphia stations was likely the principal reason those stations were carried on a more extensive distant signal basis than other non-sports stations – notwithstanding that the latter (including the station he had managed) have better quality newscasts. *See* Tr. 2366-67 (Alexander); *see also id.* at 2254 & 2258 (presence of Orioles games on the station he managed made that station less likely to be dropped by distant cable systems).

(c) Various parties have suggested that the CARP take account of license fees paid in that marketplace in assessing the value of the different types of distant signal programming. The CARP did so in the 1990-92 Proceeding and, in the Section 119 satellite rate proceeding, used those fees to set the royalties paid by cable's chief competitor, the satellite carriers, for distant signal programming. An analysis of the cable network marketplace in 1998-99 confirms the conclusion that the cable industry considers JSC programming to be the most valuable type of programming.

Mr. Trautman shows that JSC programming obtains a premium in the marketplace far beyond what measures of programming time or viewing would suggest. In the years 1998 and 1999, the license fees earned by cable networks with JSC programming were 2

½ to 5 times higher than the other cable networks reviewed by the CARP in the Section 119 proceeding. More impressive than the license fees were the amounts paid for JSC programming; marketplace data showed that more than $1.6 billion was spent on JSC programming for about 2000 hours of programming. By comparison, the A&E cable network (which PTV compared itself to in the 1990-92 Proceeding) spent $298 million on 13,974 hours of programming in the same period – establishing a price-to-time ratio 1/40th of that of JSC programming. Similarly, the viewing generated by the JSC programming on those cable network, 2.2 billion viewing hours, was about 1/9th of the viewing of Nickelodeon, which spent $554 million to acquire its programming. These numbers not only demonstrate the marketplace value of JSC programming, but show that relative program time and viewing time cannot meaningfully measure the relative value of JSC programming. *See* paragraphs 247-249, 257.

In defending against Congressional and subscriber complaints about rate increases, the cable industry has frequently pointed to the high cost of sports programming on cable networks. It is wrong to attribute all of the cable industry's particular rate increases to sports programming. But the fact that the cable industry typically has singled out sports programming as the cause of rate increases reflects not only the fact that sports programming is the most expensive type of programming; it also reflects cable industry recognition that a significantly large number of subscribers desire that programming and will accept rate increases in order to continue having access to that programming. *See* paragraphs 251, 256 *infra.*

6. **Evidence Of Changed Circumstances Also Corroborates The Bortz Results For JSC And Supports An Increase In The JSC Awards**

The CARP in the 1990-92 Proceeding determined that "new programming and promotional initiatives" provide a basis for increasing a claimant's award. *See* 1990-92 CARP Report at 123 (increasing PTV award). JSC's 1998-99 claim includes very significant new programming that is the basis for an increased award.

(a) In the 1990-92 Proceeding the CARP ruled that programming distributed by the Fox network is "non-network" programming for purposes of Section 111 of the Copyright Act and is thus eligible for Section 111 royalty compensation. The Librarian affirmed that ruling on review of the CARP Report. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55659-62. No portion of JSC's award in 1990-92 was attributable to programming distributed by Fox because, at the time, none of the JSC members had licensed any programming to Fox. In 1998 and 1999, however, three of the JSC members – the National Football League ("NFL"), Major League Baseball ("MLB") and the National Hockey League ("NHL") – had significant programming distributed by Fox. *See* paragraphs 268-276 *infra*.

The JSC programming on Fox was among the most valuable programming available to cable operators via the Section 111 compulsory license. It consisted of (1) NFL regular season and post-season telecasts, including the 1999 Super Bowl; (2) MLB game-of-the-week and post-season telecasts, including the 1998 World Series; and (3) NHL game-of-the-week and post-season telecasts, including the Stanley Cup. This proceeding marks the first time in any cable royalty distribution proceeding that an award would be made for NFL regular season and post-season telecasts, for MLB game-of-the week and post-season telecasts or NHL game-of-the-week and post-season telecasts. For some cable subscribers, the only way that they could obtain access to the 1999 Super Bowl, 1998 World Series and other JSC telecasts on Fox was via distant signal.

There should be no question about the significant marketplace value of the JSC programming distributed by Fox during 1998-99. Indeed, for the rights to televise what amounted to approximately 300 hours of NFL games, Fox paid the NFL approximately $550 million in 1998 (in addition to the costs that it incurred to produce those telecasts). By comparison, the total cost of all PBS-distributed programming in 1998, which amounted to 2000 hours (not counting repeat telecasts), cost $350 million – or $200 million less than the NFL telecasts on Fox. While the JSC telecasts on Fox were available to only a portion of cable subscribers on a distant signal basis, the same may be said about the programming of the PTV Claimants as well as the Canadian Claimants – both of whom are seeking significant increases in their royalty awards to account for changed circumstances.

(b) The principal changed circumstances argument advanced by PTV and the Canadians, as well as NAB, centers on the conversion of conversion of WTBS from the most widely-distributed distant signal to a cable network. That conversion resulted in the loss of important programming from the JSC claim. But it also resulted in the loss of important programming from the claims of other parties, including NAB. Indeed, the amount of JSC programming on WTBS during 1990-92 was less than the amount of NAB programming on WTBS. Furthermore, there were several other changes between 1990-92 and 1998-99 that affected the amounts of distant signal programming of all types that cable operators retransmitted. When all of these changes were taken into account, the relative amount of JSC programming available on a distant signal basis remained constant according to NAB's Fratrik study – while the amount of JSC programming "consumed" by cable subscribers rose according to Nielsen. *See* paragraphs 239, 267 *infra.*

The principal effect of the TBS conversion and other changes in the distant signal marketplace – aside from their negative impact on the size of the cable royalty funds – was the emergence of superstation WGN as the most widely-carried distant signal in 1998-99. No other station came close to WGN in terms of its extensive distant signal carriage – more than 70% of the cable systems that carried a distant signal during 1998-99 carried WGN, which accounted for approximately 55% of the total DSEs. Moreover, between 1992 and 1998, more than 100 cable systems added WGN as a distant signal. Again no other signal or category of signal experienced such a dramatic increase. *See* paragraphs 261-265 *infra*

The increased prominence of WGN is particularly consequential to the JSC claim because a significant portion of WGN's compensable programming during 1998-99 consisted of telecasts of the MLB games involving the Chicago Cubs and Chicago White Sox and NBA games involving the NBA Chicago Bulls. Those MLB and NBA telecasts constituted a greater portion of WGN's compensable programming in 1998-99 than in 1990-92. Moreover, they included some of the most attractive programming available – as the Chicago Cubs had one of their most successful and exciting seasons, while the Cubs' most visible and celebrated player, Sammy Sosa, battled with the Cardinals' Mark McGwire in an historic and highly publicized race to break a decades-old home run record. *See* paragraphs 261-265 *infra.*

7. **<u>JSC Should Receive No Less Than 39.9% Of The 1998 3.75% Fund And 42.2% Of The 1999 3.75% Fund</u>**

The CRT created the 3.75% fund in 1983 in response to the 1981 decision of the Federal Communications Commission ("FCC") to repeal its rules restricting the number of distant signals that cable systems could retransmit ("non-permitted distant signals"). The purpose of the 3.75% fund was to provide marketplace compensation to copyright owners of programming on non-permitted distant signals that generated 3.75% royalties. *See Adjustment of the Royalty Rate for Cable Systems*, 47 Fed. Reg. 52146, 52155 (Nov. 19, 1982), *aff'd*, *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F. 2d 176 (D.C. Cir. 1983).

Consistent with that purpose, the CRT awarded no 3.75% royalties to PTV because PTV programming did not generate any 3.75% royalties; and it awarded the Canadian Claimants and Devotional Claimants a smaller share of the 3.75% Fund than of the Basic Fund because certain Canadian signals and signals with significant amounts of Devotional programming also did not generate 3.75% royalties. The CRT awarded NAB and Music the same share of 3.75% royalties as their share of Basic royalties, while Program Suppliers and JSC received an increased share. The CRT followed the same approach in the 1989 Proceeding as did the CARP in the 1990-92 Proceeding.

In the 1990-92 Proceeding, the CARP awarded the JSC 32.6% of the 3.75% Fund (approximately 3 percentage points more than, or 110% of, JSC's Basic Fund award). The dissenting CARP member concluded that the JSC should have received 38.5% -- approximately 9 percentage points more than, or 130% of, JSC's Basic Fund award. JSC challenged the majority's 3.75% allocations before the Librarian. While the Librarian found the CARP majority's allocations troublesome, the Librarian nevertheless affirmed the CARP majority's award to JSC, emphasizing his limited scope of review. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55662-63.

In making their 3.75% Fund allocations, the CRT and CARP increased the proportion of the "pool" of royalties that were created by the elimination of PTV's share from and the reduction of the Devotional and Canadian Claimants share of the 3.75% Fund to JSC as JSC's share of the Basic Fund grew. In the 1983 Proceeding, the CRT had a total of 6.05 percentage points to allocate between Program Suppliers and JSC, and allocated 1.15 of the 6.05 points to JSC. In the 1989 Proceeding, the CRT had a total of 4.8 percentage points to allocate, and awarded 2.2 points to JSC. Finally, in the 1990-92 Proceeding, the CARP had a total of 5.7 percentage points to allocate, and awarded 3.1 points (or approximately 54% of the excess) to JSC. JSC request that the CARP allocate at least 54% of the total excess 3.75% royalties to JSC and that JSC's share of the 3.75% Funds be at least 10% higher than their share of the Basic Funds .

8. **The Music Claimants Share Of Royalties Should Be Reduced To A Level Commensurate With The Share Of License Fees That They Receive Outside The Compulsory License. No More Than 0.3% Of The Music Awards Should Be Deducted From The JSC's Awards In 1998 And 1999**

(a) None of the quantitative studies introduced by JSC or the other programming claimants attempts to measure the relative value of the musical works represented by the Music Claimants. Consequently, the CARP must look elsewhere to determine the Music awards. The CRT, in fashioning the original awards to Music, considered the license fees that the Music Claimants received from broadcasters outside the compulsory license. *See* paragraphs 428-431 *infra*. JSC believe that the CARP should take a comparable approach in determining the 1998 and 1999 music awards.

The record shows that the Music Claimants negotiate license fees with broadcasters, broadcast networks, cable operators and cable networks that generally do not amount to more than 1% of the licensees' revenues. The record also shows that those fees generally do not amount to more than 1.5% to 2.3% of the expenses that the licensees incur for their programming. There is no basis for concluding that, absent compulsory licensing, the Music Claimants would receive more than 1% to 2.3% of the royalties paid by cable systems to retransmit distant signal programming. JSC believe that the CARP should not award Music more than 2% of the 1998 and 1999 Basic and 3.75% Funds. *See* paragraphs 420-422 *infra.*

This share would, of course, be significantly less than the 4.5% share that the CRT awarded Music in the 1983 Proceeding, when superstations and other distant signals made significant use of music videos. However, that reduction is consistent with the Music Claimants' licensing practices since the 4.5% award was made twenty years ago. In particular, as a result of licensing guidelines established by the ASCAP Rate Court in the *Buffalo Broadcasting* case, *United States* v. *Am. Soc'y of Composers, Authors & Publishers,*Civ. No. 13-95 (WCC), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993), the Music Claimants share of payments made for programming has declined significantly during the past decade. Their share of cable royalties should likewise decline.

(b) On review of the 1990-92 CARP Report, the Librarian reduced the awards that the CARP had made to all parties to account for the 4.5% award that the Music Claimants received in settlement. Neither the Librarian nor the CARP made any effort to determine how much of the Music award should be deducted from the JSC award to reflect the amount and economic significance of music in JSC programming versus other types of programming. Rather, the Librarian simply reduced each award on a proportional basis. JSC was thus required to assume approximately 30% of Music's 1990-92 awards or approximately 1.35 percentage points; those 1.35 percentage points amounted to approximately $7 million in 1990-92 alone and considerably more as precedent.

JSC strongly believes it would be inappropriate for the CARP in this proceeding to reduce JSC's share on a proportional basis to account for whatever award that the CARP makes to Music. Such an approach fails to account for the facts that (1) JSC programming uses significantly less music than the programming of other claimants; (2) music plays a far less significant role in JSC programming than in other programming; and (3) the license fees that the Music Claimants receive from sports programming services are less than the fees that they receive from other entertainment services. As discussed at paragraphs 451-452 *infra*, the CARP should deduct from JSC's awards a maximum of 11.9% of the Music award in 1998 (or 0.2 percentage points in based on the 2.0% award recommended above) and 12.5% of the Music award in 1999 (or 0.3 percentage points).

9. **The Awards To NAB Should Be Reduced From Their 1990-92 Levels. NAB Should Receive The Same Level Of Royalties That Commercial Broadcasters Were Willing To Accept In Exchange For The Legislative And Regulatory Benefits They Received, And That Substantially Reduced The Size Of, The Post-1992 Royalty Funds**

The Bortz surveys, as adjusted to account for the PTV-only and Canadian-only systems, show that cable operators would have allocated 14.4% of their 1998, and 14.3% of their 1999, distant signal programming budgets to the news and public affairs programming on the distant signals they carried. JSC believes that those shares should be the starting point for determining the NAB awards – just as the Bortz results for JSC should be the starting point for determining the JSC awards. For several reasons, however, JSC believes that the NAB should receive no more than 5.0% of the 1998 Basic and 3.75 Funds and 5.1% of the 1999 Basic and 3.75 Funds (before taking account of the Music award). That award would amount to approximately 2 percentage points less than the 7.2% award that NAB received in the 1990-92 proceeding.

(a) While cable operators may be willing to accord approximately 14% of their distant signal programming budgets for local news and public affairs programming produced by broadcast stations, the record is clear that the stations would demand (if anything) far less. Thus, any consideration of the seller's perspective would mandate a significant reduction in the NAB award from the levels reflected in the Bortz results – just as the Devotional award has been reduced from its Bortz level to account for the fact that the copyright owners of devotional programming are more interested in obtaining carriage on cable systems (thereby increasing their potential for viewer contributions) than they are in having cable operators compensate them for that carriage. *See* 1989 CRT Determination, 1989 CRT Determination, 57 Fed. Reg. at 15303. As the CARP in the 1990-92 proceeding concluded, the relevant question is not simply how much is the cable operator "willing to spend" but also how much would the cable operator "have to spend;" while the operator "may be willing to spend a certain amount of its budget for a given category of programming, the market supply may be at odds with what the operator is willing to spend." 1990-92 CARP Report at 65.

The most telling evidence of how broadcasters would act in the hypothetical marketplace that the CARP must replicate can be seen in their actions leading up to and following the 1992 Cable Act. Most significantly, after successfully persuading

Congress to regulate the subscriber rates of cable operators, the broadcasters (through NAB) urged the FCC to establish a regulatory framework that would result in an average monthly subscriber rate for basic service of $4.50 – about one-quarter of the rate that cable operators were actually charging. That proposal was, of course, consistent with their objective of ensuring that broadcast programming is available as cheaply as possible to the maximum number of households and thereby maximizing the potential for advertising revenues. However, because the Section 111 royalties are tied to that subscriber rate, NAB's proposal also would have significantly reduced the amount of royalties that they (and other copyright owners) receive from the cable compulsory license.

NAB received only part of the rate reduction it had requested from the FCC. Nevertheless, its proposal before the FCC provides a reliable and objective indicator of how little broadcasters are willing to accept from cable operators for the retransmission of station-produced programming. Several other actions of the broadcasters also provide compelling evidence that broadcasters are more interested in obtaining cable carriage than in obtaining royalties for that carriage – including their failure to obtain any significant compensation from granting retransmission consent for distant signals; their successful pursuit before Congress of must carry legislation forcing cable operators to carry local broadcast signals; their support of legislation broadening the definition of what constitutes a local signal ineligible for Section 111 royalties; and their support of compulsory licensing itself which deprives all copyright owners of the ability to obtain marketplace compensation.. However, as explained at paragraph 314 below, the 5 percent share that JSC recommends for NAB is based on their proposed $4.50 rate and their Bortz shares.

(b) The principal focus of NAB's case is on the conversion of WTBS from the most widely carried distant signal to a cable network. But WTBS carried station-produced programming that NAB had consistently touted to be a significant portion of its claim. Indeed, as noted, there was more NAB programming on WTBS than there was JSC programming. There is no reason that NAB should benefit from the loss of its WTBS programming from the pool of compensable programming while all other claimants who had WTBS programming (or musical works) should see a decrease inroyalties.

According to NAB, the WTBS conversion resulted in a greater relative amount of NAB programming in the distant marketplace. But, as NAB's own witness conceded, a simple increase in the relative amount of time occupied by NAB's programming does not necessarily correlate with an increase in relative value of that programming. *See* Tr. 8983 (Ducey). It is more significant that, as a result of the WTBS conversion and several other marketplace changes, the composition of the programming in NAB's claim changed dramatically – a much larger portion of that claim for 1998-99 consisted of precisely the type of programming that historically and correctly has been considered to be the least valuable type of station-produced programming – superstation news and public affairs. *See* paragraph 321 *infra.*

10. **PTV Should Not Receive More Than Its Bortz Share – A Share That Is Essentially The Same As The Share Of Royalties That Cable Systems Pay To Carry PTV Distant Signals**

(a) Cable operators who actually carry PTV programming on a distant signal basis accord significant value to that programming – approximately 12% of their distant signal programming budgets, according to the 1998 and 1999 Bortz surveys. But the record shows that the vast majority of cable systems (77%) – representing the vast majority of cable subscribers (85%) – have "voted" not to carry any distant PTV signals; they have chosen instead to rely on local PTV signals (along with the many PBS look-alike cable networks). *See* JSC Ex. 24-X. PTV, like all of the other claimants in this proceeding, may not lawfully receive compensation for the carriage of such local signals. It is entitled to compensation only where its programming is carried on a distant signal basis. Because the Bortz survey accounts for these facts and the relevant law, the Bortz survey reflects a PTV valuation of 3.4% for both 1998 and 1999 (as adjusted for PTV-only and Canadian-only systems).

That 2.9% is essentially the same as the share of royalty fees that those cable systems actually pay to carry distant PTV signals. As a matter of simple equity, it is unfair for PTV to receive more than the fees it generates while all of the commercial claimants receive less; it would certainly be arbitrary to allocate royalties to the Canadians on a fee-generated and constant sum basis and not do the same for PTV. There is certainly nothing in the record to support the notion that cable operators value PTV programming more highly than the fees they generate and commercial programming less highly. To the contrary, the Bortz study establishes that cable operators value distant PTV programming commensurate with the amounts that they pay – a result that, if anything, seems quite favorable to PTV since (1) approximately 30% of the PTV instances of distant carriage in 1998 and 1999 are largely attributable to the must-carry rules that PTV urged Congress to adopt; and (2) approximately 72% of the cable subscribers who receive distant PTV signals have duplicating local PTV signals available to them as well. *See* paragraphs 336-337 *infra.*

(b) PTV clams that it should not share in any reduction of royalty fees resulting from that conversion because it had no programming on WTBS – that that conversion actually supports a more than doubling of its 1990-92 royalty share (5.49% of the Basic Fund) to account for the 20.9% reduction in the Basic Fund. But PTV's claim ignores the fact that in prior proceedings PTV received a significant portion of the royalties attributable to WTBS because it received – unfairly and improperly in JSC's estimation – more than the share of fees generated by PTV signals. PTV cannot have it both ways. It cannot insist on receiving a share of fees attributable to commercial signals and then refuse to share in the loss of those fees. *See* paragraphs 363-365 *infra.*

Only in the cable royalty distribution proceedings does PTV make such excessive claims for remuneration for carriage. Its approach before Congress and the Copyright Office and in the marketplace is quite different. In those forums, PTV's overarching objective is universal carriage. It thus supports forcing cable operators to carry PTV signals they may not want to carry; maintaining a compulsory licensing regime that significantly undervalues copyrighted programming and to which commercial copyright owners strongly object; and rejecting the right to require cable operators to obtain retransmission consent, concluding that "it should not be left to individual stations to trade the principle of universal access for another revenue source." JSC Ex. 57 RX at 836 (statement of PTV before Congress). Seller side considerations do not support PTV's claim and, indeed, provide a basis for awarding PTV less than its Bortz share. *See* pages 350-353 *infra.*

(c) In the 1990-92 proceeding, PTV relied heavily upon the Bortz survey. In this proceeding, PTV relies heavily upon time shares and changes in those shares. It is undisputed that PTV's time shares have increased over their 1990-92 levels. But that increase has simply brought PTV back to the time level that it enjoyed when its share of approximately 5% was first established. During all the years that PTV's share of time was progressively declining, it understandably championed non-time measures to support its award. Only now that time is on its side does PTV have a different view. The record and precedent are clear, however, that time and changes in time do not necessarily correspond to value and changes in value. And value is all that is relevant here.

PTV has not shown that the relative value of its programming has increased since 1990-92 – only that its share of time has increased. And both the Bortz study and the Rosston regression analysis show a PTV value share that is significantly less than the PTV time share. Only the Nielsen time study – that PTV had consistently attacked as wholly unreflective of value – correlates with the PTV time shares and increases in those shares. Moreover, the record shows that the value of PTV programming has decreased by the very measures that PTV itself has used in past proceedings to measure that value:

* the number of persons who contribute to PTV has decreased;
* the number of different households that watch PTV programming has decreased;
* the gap between the amount of money spent on PTV programming and the amount of money spent on programming from the PBS look-alikes has narrowed;
* the amount of carriage of fully-distant PTV signals has declined (while only the carriage of partially-distant signals, those resulting from the must carry rules increased); and
* the percentage of cable systems carrying distant PTV signals without any duplicating local PTV signals declined.

The CARP in the 1990-92 proceeding found that there was a significant change in PTV's programming practices (*i.e.,* the creation of the National Programming Service) which warranted an increase in PTV's royalty award. 1990-92 CARP Report at 115 & 123. No such change characterized the 1998-99 period. Quite simply, changed circumstances do not favor PTV's claim in this proceeding. *See* paragraphs 354-365 *infra.*

Bortz Survey

Bortz Survey

BORTZ SURVEY

1. To determine the relative value of the different types of distant signal programming categories during 1998-99, the JSC commissioned Bortz Media & Sports Group ("Bortz Media") to conduct a survey of cable operators (the "Bortz Survey"). See JSC Ex. 1 at 1 (attached to James M. Trautman testimony). The purpose of this survey was to determine how the royalties paid by cable operators would be allocated among different groups of copyright owners in an open market absent the compulsory license. See id. The Bortz survey employs a "constant sum" technique to measure this value; it asks cable operators to allocate a percentage of fixed budget for distant signal programming. See id. at 1-2.

B. **Methodology of Bortz Study**

2. In each of the years 1998 and 1999, Bortz Media conducted a survey of "Form 3" cable systems to determine the relative values they placed on seven different programming categories. *See id.* at 8-10. The approximately 2000 "Form 3" cable systems account for over 95% of the cable royalty payments. *See id.* at 8; Tr. 212 (Trautman).[5]

1. **Sample Selection**

3. Each year, Bortz Media begins with the more than 2000 "Form 3" cable systems and selects a sample of those systems. *See* Tr. 212 (Trautman). It uses a "stratified" random sampling approach to select the systems to be surveyed, with the stratification based on copyright royalty payments. *See* JSC Ex. 1 at 8. Thus, in 1998 the

---

[5] Only Form 3 systems are eligible for inclusion in Bortz Media's samples. *See* JSC Ex. 1 at 35. The remaining cable systems, the "Form 1" and "Form 2" systems, file short form statements of account that do not identify the distant signals they carry. *See* Tr. 1304 (Trautman). The lack of information about distant signal carriage restricts Bortz Media's ability to question those systems about the signals they actually carried.

Form 3 cable systems were broken down into four strata: (1) systems paying \$0-\$12,999 in royalties; (2) systems paying \$13,000-\$39,999 in royalties; (3) systems paying \$40,000-\$149,999 in royalties; and (4) systems paying \$150,000 or more in royalties. *See id.* at 48 (Table A-1).

4. The sampling plans were constructed so that proportionately more systems with large royalty payments were sampled relative to systems with small royalty payments. *See id.* at 47. This approach is intended to ensure that responses to the survey would provide a statistically valid predictor for allocation of royalty payments. *See id.*; Tr. 246-47 (Trautman). Accordingly, all of the systems paying the most in royalties – i.e., those paying more than \$150,000 - are selected for the survey, whereas approximately one in twenty systems are included in the strata for smallest systems. *See* Tr. 247-48 (Trautman). From this original sample, Bortz Media identifies those systems it has selected that both carried a distant signal and had more than one type of distant signal programming for inclusion in its eligible sample. *See id.* As such, systems that carried no distant signal or carried PTV or Canadian distant signals only were excluded from the survey. *See* Tr. 471-72 (Trautman).[6]

5. Once the eligible samples for 1998 and 1999 were determined, Bortz Media retained a leading market research firm to conduct the cable operator surveys in both years. Only interviewers who specialize in surveying professional and managerial personnel were utilized. Interviewers were not told the name of the client or given any information regarding the nature of the study. The research firm achieved response rates of

[6] Mr. Trautman's adjustment of the Bortz survey results to account for the PTV-only and Canadian-only systems is discussed below in paragraphs 89-92.

57% and 67% among the sampled systems for the key constant sum question in 1998 and 1999, respectively. *See* JSC Ex. 1 at 9.

2. **Survey Questionnaires**

6. The questionnaires for the 1998 and 1999 studies were designed so that respondents had the qualifications and information necessary to address the key constant sum valuation question. The survey "screened" potential respondents for their involvement in making decisions related to the carriage of distant signals. The result of this "screening" process was a respondent group that overwhelmingly consisted of general managers, marketing directors or managers and programming directors or managers. These respondents were also read, on multiple occasions, a list of the distant signals actually carried by their cable system and were specifically instructed to consider only the non-network programming on those distant signals. *See id.* at 9.

7. Before being asked the key constant sum question, respondents were asked preparatory questions about the popularity and advertising usage of distant signal non-network programming. These preliminary questions were intended to focus the respondent on the value of various programming types in terms of attracting and retaining subscribers. *See id.*; Tr. at 505-06 (Trautman). The first preliminary question (the second question overall) asks the respondent which categories of distant signal programming on the distant signals the cable system carried were most popular among subscribers. *See* JSC Ex. 1 at 13; Tr. 240-41 (Trautman). The third question asks the respondent to identify the types of distant signal programming (if any) used by the operator in advertising and promotion. *See* JSC Ex. 1 at 13-15; Tr. 241-42 (Trautman).

8. Finally, cable operators were asked the key constant sum question, which asked the cable operator to "assume [they] had a fixed dollar amount to spend in order to

acquire all the programming actually broadcast during [the particular year] by the stations" that cable system actually carried. JSC Ex. 1 at Appendix B (Question 4a). Respondents were first instructed to write down the programming categories and to think about their relative value. They were then asked to write down their estimates for each category. Subsequently, the interviewer reviewed the estimates for each category with the respondent to allow for any changes upon reconsideration. *See* JSC Ex. 1 at 39.

C. <u>**Historical Background**</u>

9. Constant sum surveys such as the one conducted by Bortz Media for 1998 and 1999 have been introduced by the JSC and other parties since the inception of royalty distribution proceedings in 1978. These constant sum surveys were repeatedly improved in light of the criticisms offered by the parties and the CRT. As the CRT's (and then the CARP's) distribution jurisprudence progressed, the constant sum surveys offered by the JSC and other parties were given greater weight. The increased weight given to the results of constant sum surveys – chief among those the Bortz survey – led to a corresponding increase in the JSC's share of royalties.

1. <u>**Constant Sum Surveys In The 1978-80 Proceedings**</u>

10. In the 1978, 1979 and 1980 distribution proceedings, the JSC sponsored cable operator surveys performed by Batten, Barton, Durstine & Osborn, Inc. ("BBDO surveys"). *See* 1978 CRT Determination, 45 Fed. Reg. 63029 (Sept. 23, 1980); *1979 Cable Royalty Distribution Determination,* 47 Fed. Reg. 9879, 9882 (Mar. 8, 1982) (hereinafter "1979 CRT Determination"); *1980 Cable Royalty Distribution Determination,* 48 Fed. Reg. 9552, 9555 (Mar. 7, 1983) (hereinafter "1980 CRT Determination"). In contrast to the current Bortz surveys, the BBDO surveys were not designed to produce results representative of the cable universe as a whole. *See* 1990-92 Trautman W.D.T. at

1-5 (D2:4). Moreover, the BBDO surveys were focused on the executives of multiple-system operators, rather than the persons responsible for making the decision to carry distant signals at the cable system level. *See id.* The respondents were not informed of the distant signals actually carried in which the survey was conducted. *See id.* There were several other criticisms leveled at the 1978-80 surveys, including the inclusion of only four programming categories and the failure to exclude network programming. *See id.*[7]

11. In making its 1978-80 determinations, the CRT gave only limited weight to the BBDO surveys. While acknowledging that JSC programming was more valuable to cable operators than sports' share of broadcasting hours or the viewing sports programming received, *see e.g.* 1979 CRT Determination, 47 Fed. Reg. at 9892, the CRT stated that the cable operator surveys presented, while useful to its decision, could not be "directly quantified or converted into a royalty share allocation," *id.* at 9893.

2. **<u>Constant Sum Surveys In The 1983 Proceeding</u>**

12. In the 1983 cable royalty distribution proceeding, the NAB and PTV joined the JSC in offering constant sum surveys of cable operators in support of their royalty claims. While these surveys differed somewhat, they were all focused on cable operator valuations of programming rather than time or signal carriage data.

a. **<u>JSC Constant Sum Survey</u>**

13. In the 1983 Proceeding, the JSC retained Browne, Bortz & Coddington ("BBC") (the predecessor to Bortz Media) to conduct its cable operator survey. *See* 1983 CRT Determination, 51 Fed. Reg. at 12795-96. With the assistance of Drs. Michael Wirth

[7] The various criticisms of the JSC-sponsored cable operator surveys and the various adjustments thereto will be discussed in depth in paragraphs 51-119- below.

(Professor and Chairperson of the Department of Mass Communications) and George Bardwell (Professor of Mathematics and Statistics) at the University of Denver, BBC designed a study employing the employing a constant sum technique. In developing the study, BBC sought to improve upon the earlier BBDO constant sum surveys and to respond to the concerns expressed by the CRT with respect to those surveys. *See* JSC Ex. 1 at 29-30.

14. There were several changes in the methodology implemented by BBC. Rather than interviewing multi-system operator executives, the 1983 BBC survey was focused on cable system operators because of their more detailed knowledge of programming value at the local level. *See* 1983 Cable Royalty Distribution Determination, 51 Fed. Reg. at 12796. The 1983 used, for the first time, a stratified random sampling approach. *See id.* BBC, in response to criticisms by other parties leveled at the BBDO surveys, asked cable operators to allocate 100% of a fixed budget rather than a hypothetical $100 of distant signal "value." *See id.* Further, in contrast to the BBDO surveys, the cable operators were informed of the distant signals carried by their cable system in 1983. *See id.* The 1983 BBC survey did not ask the respondents to value devotional programming or the programming on Canadian signals carried by the cable operators. *See id.* Systems not carrying a PTV station as a distant signal basis in 1983 were not asked to value PTV programming. *See id.* The BBC survey was conducted in 1985 and asked respondents how they valued the programming in 1983. *See id.*

15. The results of the BBC survey showed that live professional and college team sports programming was the most valuable kind of distant signal programming to cable operators. *See id.*

b. **NAB Constant Sum Surveys**

16. The NAB sponsored two constant sum surveys performed by the ELRA Group in the 1983 Proceeding: (1) a survey of cable operators; and (2) a survey of cable subscribers. The NAB offered the cable operator survey as more relevant to the distant signal marketplace, and therefore urged the CRT to give it greater significance in setting the awards. *See id.* at 12798. The subscriber survey was offered as "confirmation" of the results of the cable operator survey. *See id.* Like the BBC survey, the ELRA constant sum surveys were conducted in 1985 and asked cable operators and subscribers about the value of distant signal programming in 1983. *See id.*

17. Like the BBC survey, the ELRA cable operator survey selected a sample of cable systems and attempted to interview cable system management. The respondents were read a list of the distant stations carried by their system in 1983, and then were asked to value the various types of programming broadcast by those stations in 1983. *See id.* at 12798-99. Unlike the BBC survey, respondents were asked about devotional programming and the programming on Canadian stations. *See id.* at 12799. If, however, the cable system did not carry a PTV or Canadian station, they were not asked to value PTV or Canadian programming, and that category was assigned a zero. *See id.* Finally, rather than allocating 100% of a fixed budget, the cable operators were asked to allocate an assumed value of $100 for all distant signal programming. *See id.* The ELRA study made no "attempt to weight [sic] survey responses based on the amount of royalties paid by the sample cable systems." 1990-92 Trautman W.D.T. at 8 (D2:4).

18. The results of the ELRA cable operator survey resembled those of the BBC cable operator survey very closely. *See* JSC Ex. 1 at 26 (Table IV-1). Indeed, with the exception of the "Movies" category, no individual category studied in both cable operator survey differed by more than three percentage points from one survey to the other. *See id.* For example, the allocation to the sports category was 36.1% in the BBC survey while it was $35.66 in the ELRA cable operator survey. *See id.*

19. The ELRA cable subscriber survey differed in some respects from the cable operator survey. Rather than being asked to allocate a hypothetical $100 among program categories, subscribers were asked to allocate $10 among the categories. *See* 1983 CRT Determination, 51 Fed. Reg. at 12798-99. Moreover, a disproportionate number of the respondents to the cable subscriber survey were female who allocated relatively less to the sports category. *See id* at 12799. The CRT also noted some amount of subscriber confusion with the survey. *See id.* at 12810.

20. Notwithstanding these differences, and the subscriber confusion highlighted by the CRT, the ELRA cable subscriber survey generated results that generally resembled those of the ELRA cable operator survey. *See id.* at 12798.

c. **PTV Constant Sum Survey**

21. In addition to the constant sum surveys presented by the JSC and the NAB, PTV offered its own constant sum survey of cable operators. The PTV constant sum survey, however, differed in several material respects from the BBC and ELRA cable operator surveys. Instead of asking cable operators to value the different programming categories, the survey focused on the value of public television signals versus commercial television signals. As the CRT described it, "the most significant question of the survey asked cable operators to allocate $100 between distant signal commercial television and

distant signal public television." *Id.* at 12797. However, if the cable operator did not carry a distant PBS station, he was asked to allocate the $100 between commercial television and public television. *See id.* The PTV constant sum survey also included Form 1 and Form 2 systems among its respondents. *See id.*. Finally, the respondents were not asked about the value of non-commercial signals "in their business," but were asked to value the "worth" of programming on non-commercial signals. *See id.* at 12809.

22. As noted by the CRT, there were substantial biases in the PTV constant sum survey. The CRT found that the "two-point scale" – i.e., the comparison of "non-commercial" versus "commercial" – led to respondents giving PTV a "much higher value." *Id.* Moreover, the information given to respondents biased them in favor of giving PTV a higher share. Rather than being shielded from the purpose of the survey, respondents were informed that "the study we are doing is concerned mainly with Public Television stations and how they fit into your thinking about cable channels." *Id.* at 12797. The respondents were asked a number of aided questions about PBS and to comment on the value of PBS programs before being asked the key constant sum question. *See id.* The CRT noted that the PTV witness sponsoring the constant sum survey conceded that conveying such information to the respondent "would probably raise the subject's rating." *Id.* The survey design also did not adequately inform the respondent as to whether the signals they carried were distant or local. As a result, nearly twice as many respondents said they were carrying a distant signal as actually carried distant signals in the cable universe. *See id.*

23. The PTV constant sum survey resulted in an allocation of an average of $27.50 of the $100 "value" of distant signals to non-commercial distant signals. *See id.*

Those systems carrying only a local PTV signal allocated, on average, $36.67 to "public television."

d. **CRT's Analysis Of The 1983 Constant Sum Surveys**

24. Faced with cable operators surveys from several of the Phase I parties,[8] the CRT decided to give weight to two of those studies – the BBC survey and the ELRA cable operator survey. In general, however, the CRT criticized all of the constant sum surveys for having been conducted in 1985 – more than a year after the end of 1983. *See id.* at 12808-09. The CRT found that this created a "recall problem" for respondents. *Id.* at 12808.

25. The CRT gave greater weight to the constant sum survey presented by the JSC than in past proceedings when making its royalty allocations. Indeed, in recognition of the improvement of the cable operator survey and the fact that the JSC's case "continues to hold up well in expert testimony," among other things, the CRT increased the JSC's share of royalties from 14.8496% to 16.35%. *See id.* at 12811. As to the survey itself, the CRT concluded that the BBC cable operator survey was "adequate in design and methodology" and could be accorded some weight. *See id.* at 12810. The CRT noted that BBC properly designed the survey so that: (1) the interviewer and interviewee were unaware for whom the survey was being conducted; (2) the proper individual was surveyed; and (3) the cable operator was asked specifically about the value of the program in terms of subscriber attraction and retention; and (4) no confusion existed as to which distant signals they were being asked about, because the distant signals were identified for

[8] In addition to the constant sum surveys offered by the JSC, NAB and PTV, the Devotional Claimants and Canadian Claimants offered cable operator surveys based on other kinds of survey methodologies. *See id.* at 12809.

the respondents. *See id.* However, the CRT did criticize the BBC survey for failing to include devotional programming and Canadian programming. *See id.* It also criticized the BBC survey for placing an automatic zero on the PTV category where no PTV distant signal was carried "whereas operators who did carry PBS were not accorded any automatic percentages." *Id.*

26. The CRT also found that the ELRA constant sum surveys were "adequate in design and methodology" and therefore could be accorded some weight. The CRT noted that ELRA "properly attempted to reach the appropriate respondent at the cable system," and that "all program types under consideration by the Tribunal were placed before the respondent." *Id.* at 12809. However, the CRT criticized the ELRA cable operator survey for asking a cable operator to allocate $100 rather than focusing the operator "on the hard business decisions that he or she makes." *Id.* It also criticized the assignment of automatic zeros to the PTV and Canadian categories, although the CRT admitted that because many cable operators could not import Canadian stations, the detriment to the Canadian Claimants was reduced. *See id.* at 12810.

27. The CRT rejected the PTV constant sum survey as being so flawed as to be of no value to the Tribunal in making its allocations. *See id.* at 12809. In addition to the concerns stated above, the CRT stated that "we have no way of translating [the two-point scale of the PTV constant sum survey] to a proper allocation, or even a plus or minus credit, to PBS." *Id.*

3. Constant Sum Surveys In The 1989 Proceeding

28. The JSC was the sole Phase I party to submit a constant sum survey in the 1989 cable royalty distribution proceeding. In that proceeding, however, the 1989 JSC

cable operator study was supported by the NAB, PTV and the Devotional Claimants. *See* JSC Ex. 1 at 30.

29. The JSC again retained the principals of BBC – who had formed Bortz & Company – to develop a constant sum cable operator survey for the 1989 Proceeding. In addition to consulting Drs. Wirth and Bardwell, Bortz & Company also consulted Dr. Leonard Reid, Professor and Chair of the Department of Advertising at the University of Georgia, to aid it in the survey and sample design. *See id.* Dr. Ringold testified that Dr. Reid is a "fairly well known scholar" in the field of survey research. *See* Tr. 5588 (Ringold)

30. The study design for the 1989 Proceeding reflected additional efforts to resolve issues raised by the CRT in the 1983 Proceeding. *See id.* To address the concern of the CRT that the survey was conducted too long after the end of the year for which the cable operators were being surveyed, the 1989 survey was conducted as close to the end of the year as possible based on the data available from the Copyright Office as to the carriage of distant signals. *See id.* at 37. The 1989 survey also reflected a change in the key constant sum question; it asked the cable operator to allocate a fixed budget for distant signals among program types. *See* 1989 CRT Determination, 57 Fed. Reg. at 15293. This change was made to tailor the constant sum question more closely to the function that the cable operator performs. *See id.* Finally, the 1989 survey included the Devotional and Canadian programming categories. *See id.*

31. The CRT recognized that Bortz & Company had taken "important steps to improve the validity and reliability" of the results of the cable operator survey. *See id.* at 15300. Although the CRT noted several concerns that "affected [its] allocation," it

concluded that the Bortz survey was "valid, and a key part of [its] determination." *Id.* at 15301. The CRT stated that it was giving "new weight" to the Bortz survey. *Id.* at 15302.[9] Accordingly, the CRT raised the JSC's share of royalties from 16.35% to 23.8%. *See id.*

4. **Constant Sum Surveys In The 1990-92 Proceeding**

32. In the 1990-92 distribution proceeding before the CARP, the JSC once again submitted a constant sum cable operator survey conducted by Bortz & Company. Once again, the JSC was joined by the NAB, PTV and the Devotional Claimants in supporting the methodology and results of the Bortz survey. *See* 1990-92 CARP Report at 26. In addition, the Canadian Claimants presented their own constant sum survey of cable operators.

33. In the 1990-92 Proceeding, Bortz & Company presented the results of the 1990, 1991 and 1992 Bortz surveys. Because the 1990 and 1991 surveys were conducted prior to the release of the CRT's 1989 decision, those surveys employed essentially the same methodology as the 1989 survey. *See* JSC Ex. 1 at 31. Following the release of the 1989 CRT decision, however, Bortz & Company made several modifications to the survey for 1992. Bortz & Company again consulted with Drs. Wirth and Bardwell of the University of Denver and Dr. Reid. They also consulted with Dr. Samuel Book, the President of MTA Marketing, the oldest and most experienced consulting firm specializing in the cable industry, *see* 1989 Book W.D.T. at 1 (D2:6), and a leading survey research scholar in designing the questionnaire and sample, *see* JSC Ex. 1 at 31.

[9] Indeed, the CRT specifically increased the NAB's share in response to the "higher credit" given to the Bortz survey. *See id.* at 15303.

34. The Canadian Claimants offered their own cable operator survey, sponsored by Drs. Ford and Ringold. *See* 1990-92 CARP Report at 134. While the Canadian survey also used the constant sum methodology, it surveyed only the cable systems that carried Canadian distant signals. In contrast to the Bortz survey, each respondent was asked to value the programming on a particular Canadian signal. *See id.* at 135. In addition to these questions, the Canadian survey asked a "Bortz-type" question – that is, the respondent was asked to allocate a budget among all of the categories of distant signal programming that they carried. *See* Trautman W.R.T. at 9; Tr. 5996-97 (Ringold) ("we attempted to replicate the Bortz item in an effort to in some sense benchmark their study against ours and ours against theirs."). The results that were obtained for Canadian programming on this "Bortz-type" question were virtually identical to the results that the Bortz survey obtained in the same years from those cable operators who carried Canadian distant signals. *See* Trautman W.R.T. at 9; Tr. 5694-95 (Ringold).

35. The 1990-92 CARP placed even more weight on the results of the Bortz survey in making its royalty allocations than the CRT did in the 1989 Proceeding. It characterized the Bortz survey as "highly valuable in determining market value." 1990-92 CARP Report at 66. In support of its decision to place considerable weight on the Bortz survey, the CARP found that the Bortz survey was "focused more directly than any other evidence to the issue presented: relative market value." *Id.* at 65. The CARP explained:

> The critical significance of the Bortz surveys is the essential question it poses to cable system operators, that is: What is the relative value of the types of programming actually broadcast in terms of attracting and retaining subscribers? That is largely the question the Panel poses when it constructs a simulated market. Further, the question asks the cable system operator to consider the same categories we are presented here in the form of claimant groups – that is,

> sports, movies and the others. That is also what the Panel must do.

Id. at 65.

36. The CARP did not accept the results of the Bortz survey *in toto*. Rather, the CARP found three limitations to the Bortz survey: (1) its execution; (2) it studies attitudes rather than behavior; and (3) it did not take into account the "supply side" of the "supply and demand equation." *Id.*

37. In recognition of the JSC's share in the Bortz survey, and the evidence introduced by JSC corroborating their Bortz share and showing the increasing value of JSC programming, the CARP adjusted the JSC's award from its 1989 level (23.8%) to 29.5%. *See id.* at 99-100. The CARP did not explain why the "supply side" considerations were a basis for departing from the JSC's Bortz survey share. *See* Crandall W.D.T. at 11-12 ("The panelists do not cite to, and I am not aware of, any evidence that JSC's relative willingness to supply programming would have resulted in a lower share of royalty revenues than was reflected in the Bortz survey."). They also did not explain why any of the other limitations would result in a downward adjustment of the JSC share in the Bortz surveys, or indeed how they affected the results of the survey at all.

D. **Relevance of Bortz Survey**

38. The Bortz survey of cable operators is, as the 1990-92 CARP noted, "highly valuable" to the determination of the relative marketplace value of the different types of distant signal programming because it poses the same question that is before the Panel: what is the relative value of each programming type in attracting and retaining subscribers? In short, the results of the Bortz survey are the best evidence of what each of

the various programming types would receive in the marketplace from cable systems absent the compulsory license.

39. The significance of the Bortz survey lies in that it determines the relative values placed on the programming types by the actual marketplace participants. The respondents are cable industry executives actually involved in the process of making decisions regarding the selection of programming. *See* JSC Ex. 1 Trautman W.D.T. at 9; 1990-92 Bortz W.D.T. at 1 (D2:3) (noting that survey respondents are "knowledgeable, randomly-selected cable industry executives. In the course of their daily business activities, the respondents must regularly weight the relative value of various types of programming"). Indeed, the cable operators' perceptions about the value of distant signal programming that drove their decisions to carry distant signals in the first instance. *See* 1990-92 Tr. 10750-51 (Scheffman).[10]

40. The cable operators surveyed by Bortz Media have the best information as to the relative value of the different kinds of programming on distant signals. Cable operators are frequently called upon to assess the value of alternative types of programming – such as news, sports, movies and series – when deciding to carry a new program service or drop an existing service. *See* 1989 Book W.D.T. at 3 (D2:6); Egan W.D.T at 4 n.1 ("The types of respondents surveyed by Bortz . . . are typically familiar with and involved in programming issues."). The cable system operators surveyed are aware of the demographics of their systems' markets and the kinds of programming that will increase demand for subscriptions. *See* Crandall W.D.T. at 8-9. As PTV witness

[10] This portion of the 1990-92 Proceeding transcript was designated by PTV on June 16.

John Fuller testified in the 1990-92 Proceeding, cable operators "are working off their own experience from decisions that [they] have made about what they carry and what they don't . . . so . . . I think that the measure provided by Bortz [is] something that would be answered by a cable operator during an interview with some authority and a well-informed decision." 1990-92 Tr. at 5209 (Fuller) (D6:11); *see also* 1990-92 Scheffman W.D.T. at 22 (D4:24) (PTV witness noting that the Bortz survey asks cable operators to provide relative valuations "via a budgeting process with which they are likely to be familiar"); Crandall W.D.T. at 9 (noting that Bortz survey respondents are able to make a reasonably accurate assessment of the relative value of programming in attracting and retaining subscribers). For this reason, "[f]rom an economist's standpoint, sampling and aggregating the valuation opinions of buyers in the would-be marketplace provides a very robust model of how cable program budgets would have been spent in a market where programming on distant signals was being sold." *Id.* at 9.

41. The responses given by cable operators to the key constant sum question of the Bortz survey are predictive of the relative amounts that they would spend on the programming they carried in a marketplace without a compulsory license. Dr. Joel Axelrod, the author of the seminal research study on the use of the constant sum scale, *see* Tr. 5603-04 (Ringold), stated that the "constant sum technique is widely used" and "its predictive validity for purchase behavior has been amply documented in . . . published research." 1990-92 Axelrod W.R.T. at 3 (D3:13); 1990-92 Tr. 11245-46 (Axelrod) (R3:30) (stating that "[i]n the aggregate, [cable operator] behavior would very closely mirror" their responses to the Bortz survey). The Canadian Claimants' survey expert, Dr. Ringold, confirmed that the constant sum survey was predictive of what cable operators

would spend in the marketplace for distant signal programming. Tr. 5612-13 (Ringold). Indeed, constant sum methodology is often relied upon by businesses to make a variety of decisions involving substantial amounts of money. *Id.* at 5607.

42. In his testimony submitted for the 1989 Proceeding, Dr. Reid noted the long history of the constant sum survey methodology dating back to 1954, and the fact that it is employed for concept testing, price sensitivity studies, simulated shopping studies, advertising testing, and segmentation research. *See* 1989 Reid W.D.T. at 5 (D2:10). He stated that the constant sum survey had proven effective because it was easy to design and use and lends itself to the use of sophisticated statistical procedures. *See id.* at 5-6. Dr. Reid described some of its most notable applications, including uses by the Coca Cola Company. *See id.* at 12.

43. In addition, Dr. Reid provided a summary of the substantial research indicating that the constant sum methodology performs extremely well at predicting market participant behavior.[11] Dr. Reid described how Dr. Joel Axelrod (a JSC witness in the 1990-92 Proceeding) had shown through his 1968 study of survey research methods that the constant sum methodology was the most accurate predictor of purchasing behavior based upon his analysis of the actual purchasing decisions made by 4,500 women. *See id.* at 10-11. Dr. Reid also discussed how Drs. Haley and Case had studied the how the constant sum method predicted the behavior of 630 women who were responsible for shopping decisions. The Haley and Case study showed that the constant

[11] Dr. Ringold complimented Dr. Reid's testimony as a good primer on the use of constant sum methodology; she described it as something that would be useful in teaching doctoral students about constant sum scaling. *See* Tr. 5587-88.

sum methodology was a measure that "most accurately reflected the brand preferences of the tested sample of respondents" *See id.* at 11-12. Dr. Ringold confirmed the research lineage of the constant sum methodology presented by Dr. Reid, stating that it tests as "either first or tied for first" in predicting marketplace behavior. *See* Tr. 5596-97 (Ringold).

44. A variety of experts from different disciplines – economists, statisticians, market researchers, and industry experts – offered by a number of different claimants have testified that the methodology applied in the Bortz survey provides an excellent measure of the relative marketplace value of the different categories of distant signal programming in the absence of a compulsory license:

* Dr. David Scheffman, a Vanderbilt University economist testifying on behalf of PTV in the 1990-92 Proceeding, stated that the results of negotiations in the free marketplace ought to be "very similar" to the results of the Bortz survey. 1990-92 Tr. at 11331-32 (Scheffman) (R3:31). He further testified that "the Bortz survey is the most useful and pertinent empirical analysis" for purposes of allocating cable royalties. *See* 1990-92 Scheffman W.R.T. at 23 (D4:24).

* PBS Research Director John Fuller testified in the 1990-92 Proceeding that the Bortz survey is the "most logical and appropriate source for defining value." 1990-92 Tr. 5233 (R3:24). Mr. Fuller further testified that the Bortz survey is a "direct measure [of relative value] and . . . that's what [the CARP] should use as opposed to say some viewer measure." *Id.* at 5233-34 (Fuller).

* Dr. William Fairley, a statistician and survey expert proffered by PTV in the 1990-92 Proceeding testified that the Bortz survey "is directed at a key question in interest here that the central issue is about economic value, however defined, and relative value." 1990-92 Tr. 5847 (Fairley) (R3:26).

* Dr. David Scheffman, an expert in business strategy and applied econometrics sponsored by PTV in the 1990-92 Proceeding, stated that the "great strength" of the Bortz survey was that it "is much more closely related to the business realities of programming choices and constraints and to the likely drivers of cable operators' valuations" than competing studies. 1990-92 Scheffman W.D.T. at 22 (D4:24).

* Dr. Michael Salinger, a Boston University economist testifying on behalf of the Devotional Claimants in the 1990-92 Proceeding, stated that the Bortz survey is a close and unbiased estimate of what cable operators would pay in a free market. *See* 1990-92 Tr. 6700, 6775-77 (Salinger) (R3:28).

* Dr. Stephen Wildman, a economist testifying on behalf of the NAB in the 1990-92 Proceeding, stated that "I think it makes sense to ask the cable operator how the cable operator values things . . . what the cable operator reports on their own values . . . really should be given primacy." 1990-92 Tr. 2547-48 (Wildman) (R3:23).

* Dr. Richard Ducey, the then-NAB Vice President of Research testified in the 1990-92 Proceeding that the Bortz survey is a direct measure of relative value of distant signal programs. *See* 1990-92 Tr. 2091 (Ducey) (R3:21); 1990-92 Ducey W.D.T. at 3 (D3:16). Dr. Ducey testified in the current proceeding that the Bortz survey was instructive of the relative value of programming.

* Dr. Andrew Joskow, an expert economist for the NAB in this proceeding, testified that the Bortz survey is an "appropriate basis for allocating royalties," and that it is "most useful for determining relative values even in the hypothetical marketplace without a compulsory license." Joskow W.R.T. at 8-9.

* Paul Much, and investment banker and valuation expert testifying on behalf of the NAB in the 1990-92 Proceeding, stated that the Bortz survey is a fair, equitable and appropriate way to allocate value. *See* 1990-92 Tr. 2353-54 (Much) (R3:22).

* Dr. Glyn Wooldridge, an expert in statistics and survey research, testified that the results of the Bortz survey were a "valid representation of cable operators' allocation of value to types of programs carried on distant signals." 1989 Wooldridge W.D.T. at 3-4 (D3:12).

45. The testimony highlighted above demonstrates the inherent relevance of the Bortz survey in the Panel's allocation of the 1998-99 cable royalties and corroborates Bortz Media's belief that its survey results "provide the best indication of the relative value of the different types of non-network distant signal programming." JSC Ex. 1 at 2.

E. **Reliability and Validity of Bortz Study**

46. The Bortz survey, which has been refined over the course of more than twenty years, is a highly reliable and valid measurement of the relative marketplace value of distant signal programming. The reliability and validity of the Bortz survey has been subjected to close scrutiny during the course of the CRT and CARP distribution proceedings, and the evidence has shown that the Bortz survey can safely be relied upon by the Panel in making its royalty allocations.

47. The CRT and CARP both have found the Bortz Survey to be reliable and methodologically valid. In the 1990-92 Proceeding, the CARP held that the Bortz surveys was "well designed" and intended to ask the right question of cable operators. 1990-92 CARP Report at 66. As noted above, the CARP endorsed the validity of the methodology of the Bortz survey by concluding that it "focused more directly than any other evidence to the issue presented: relative market value." *Id.* at 65.

48. Similarly, the CRT concluded that the Bortz survey was "valid" in the 1989 Proceeding, and accordingly made it a key part of its determination. *See* 1989 CRT Determination, 57 Fed. Reg. at 15301. In its decision, the CRT found that the Bortz & Company's execution of the cable operator survey followed "high standards of procedure" and that the reliability and validity of the survey had been improved over prior surveys. *See id.* at 15300.

49. The CRT's and CARP's confidence in the reliability and validity of the Bortz survey is well-founded in the testimony of numerous expert witnesses. In testimony designated by the JSC in this proceeding, several experts explained why the results of the Bortz survey were both reliable and valid. This testimony was corroborated by the testimony of witnesses offered by other parties in support of the Bortz survey.

* Dr. Samuel Book testified in the 1989 Proceeding on behalf of the JSC as to the validity and reliability of the Bortz survey results. He testified that, based on his market research experience and training, that he would accept the results of the 1989 Bortz survey as valid and reliable. *See* 1989 Book W.D.T. at 2 (D2:6). He stated that the survey was "competently designed and implemented" and that it "used generally accepted methods of sampling, questionnaire design and interviewing." *Id.* He found the consistency of the 1989 survey with prior constant sum survey data – offered by the JSC and other parties – to be a confirmation of the 1989 Bortz survey's acceptability. *See id.*

* Dr. Ringold testified in the 1990-92 Proceeding that the consistency of the results between the Bortz survey and the "Bortz-type" question on the Canadian survey gave her confidence as to the reliability of the Bortz survey. *See* 1990-92 Tr. 7796-98 (D6:12).

* Dr. John Robinson testified on behalf of the NAB in the 1989 Proceeding that the results of the Bortz survey could be taken as accurate because it was "carefully conducted following accepted scientific principles of survey research design." 1989 Robinson W.D.T. at 2 (D3:11).

* Dr. Glyn Wooldridge testified on behalf of the Devotional Claimants in the 1989 Proceeding stated that, based on his analysis of the methodology used by Bortz & Company, that the Bortz survey had "internal" and "external" validity. 1989 Wooldridge W.D.T. at 3-4 (D3:12).

* Dr. Richard Ducey testified in the 1990-92 Proceeding that the Bortz survey was reliable and had construct validity. Tr. 1919 (Ducey).

* Dr. David Scheffman testified on behalf of PTV in the 1990-92 Proceeding that the Bortz study "appears to follow standard methodology in research design and implementation." 1990-92 Scheffman W.D.T. at 22 (D4:24).

50. The reliability and validity of the Bortz survey was not directly challenged by a expert in survey research during this proceeding. Indeed, the primary witness offering criticism of the Bortz survey in this proceeding – Dr. William Fairley – testified that the Bortz survey is "basically well-conducted," and that he "technically [did not] have much of a problem with a great many features of it." Tr. 9932-33 (Fairley). He testified that the "Bortz survey by concentrating on what actually happened, that's a useful

methodological tac[k] to take in forming a questionnaire." *Id.* at 9931-32.[12] *See also* paragraphs 60-64- *infra*.

F. **Issues Raised Concerning Bortz Study**

1. **Background**

51. A variety of criticisms have been leveled against the Bortz surveys (as well as other constant sum surveys) over the years. To the extent such criticisms could be addressed consistent with the constant sum methodology employed, Bortz Media has been responsive in improving the design and execution of the Bortz survey. Where a criticism could not be addressed by the constant sum methodology, or where the designers of the Bortz survey have felt that the criticisms were inappropriate, both Bortz Media and the JSC have put forth testimony as to the reasons why the survey design was not changed to respond to those criticisms. As a result, the Bortz survey has been refined over the years to be more closely tailored to the needs of the CRT and, later, the CARP in making royalty allocations. The 1998 and 1999 Bortz surveys thus reflect the benefit of years of experience and multiple efforts to perfect the methodology and execution of the survey.

52. The responsiveness of Bortz Media and its predecessors to concerns raised by the CRT is prevalent throughout the history of the distribution proceedings. For example, the early BBDO surveys were directed at top executives of cable MSO's. Beginning in 1983, BBC redesigned the survey to focus on interviewing management at

[12] Dr. Leland Johnson, while praising the Bortz survey in his direct testimony, *see* Johnson W.D.T. at 29, offered some criticism of the Bortz survey in his rebuttal testimony. His criticisms are discussed separately below in paragraphs 73-84-. Dr. Johnson's criticisms are not cited here because Dr. Johnson failed to establish any expertise in survey research methodology or survey implementation.

the system level to obtain responses from those "most familiar with programming carried by the system." JSC Ex. 1 at 33. The CRT determined that the BBC survey was properly designed in this respect to "ascertain the proper individual." 1983 CRT Determination, 51 Fed. Reg. at 12810. However, in the 1989 Proceeding, the CRT expressed concern regarding the qualifications of 11% of the survey respondents and their involvement in the program budgeting process. *See* 1989 CRT Determination, 57 Fed. Reg. 15301. Upon recognizing this criticism, Bortz Media redesigned the questionnaire so that responses would be obtained from the person "most responsible for programming decisions at the cable system." JSC Ex. 1 at 33-34.

53. A number of other concerns were raised in CRT proceedings and then addressed by Bortz Media and its predecessors:

* Bortz Media and its predecessors have been responsive to the concerns raised by the CRT about the inclusion and definition of the categories of programming. In response to the praise of the 1983 ELRA study for including all programming categories, the 1989 Bortz survey included the devotional and Canadian programming categories. 1989 CRT Determination, 57 Fed. Reg. at 15293. Since the cable operator survey was first introduced, concerns have been raised about the wording of the descriptions of the various programming types. In the 1983 study, BBC developed category definitions that improved upon those used in earlier BBDO surveys. However, in response to the preference expressed by the CRT in the 1989 Proceeding for enhanced programming definitions, the 1992 survey was revised to use category descriptors based on the definitions developed by the CRT itself. *See* JSC Ex. 1 at 34-35.

* In the 1983 Proceeding, the CRT expressed concern regarding the ability of respondents to recall the programming actually carried in 1983 when they were being asked the key constant sum survey question in 1985. In response to this criticism, the Bortz surveys began to be conducted as soon as practicable to the end of the year being studied. *See id.* at 37-38

* The CRT criticized the BBDO surveys for failing to focus respondents on the actual distant signals that were carried by the respondents' cable systems. To address this criticism, beginning with the 1983 BBC

survey, all subsequent surveys have incorporated actual signal carriage information obtained from the Statement of Accounts filed by cable systems. *See id.* at 38.

* In the 1983 Proceeding, the CRT raised questions regarding the formulation of the constant sum question in the context of asking respondents to allocate "value" to the various programming categories, rather than allocating a fixed budget for the purpose of purchasing distant signal programming. In response, Bortz & Company modified the questionnaire so that respondents were asked "to allocate a programming budget – a task closely related to activities [the] operators actually perform." *Id.* In response to further criticism by the CRT in the 1989 Proceeding regarding the short period of time for allocating such a budget, the key constant sum question was modified to ensure that respondents considered the question in a more formal manner, including giving the respondent the instruction to write the programming categories down and to formulate values before responding. *See id.* at 39.

54. In its 1990-92 Report, the CARP noted that the Bortz Media surveys were "well designed." 1990-92 CARP Report at 66. It offered no suggestions as to changes in the methodology of the survey. Accordingly, the 1998 and 1999 Bortz surveys are identical to the 1992 Bortz survey that was designed in response to the methodological concerns raised by the CRT in the 1989 Proceeding.[13]

2. **Execution Of Survey**

55. One of the concerns raised by the CARP in the 1990-92 Proceeding was that respondents were expected to do in ten minutes what it takes the CARP six months to do, i.e., determine the relative marketplace value of the different types of programming at issue in this proceeding. *See id.* at 66. The CARP, however, was not unanimous in offering this criticism, the dissenting member stated that:

[13] The conceptual criticisms and adjustments made by the 1990-92 CARP are addressed below in paragraphs 51-72-, in addition to certain additional methodological concerns which have re-surfaced in this proceeding.

> In having to make programming choices that directly impact on the ability of the cable system to stay in business, the cable operators are required to evaluate programming on a routine, full-time, professional basis. This constant exposure enables them to answer questions involving both programming and a constant sum budget on relatively short notice, and to recall the choices made without difficulty.

Id. at 170 (Farmakides Dissent).

56. In response to this criticism, James Trautman voiced his agreement with the dissenting member of the 1990-92 CARP. *See* JSC Ex. 1 at 40. He noted that respondents to the Bortz survey regularly "make determinations regarding the relative value of programming [and that they are] highly knowledgeable regarding the cable industry, the programming they carry and the interests of their subscribers." *Id.* Michael Egan and Judi Allen, cable executives with more than thirty combined years of experience in the cable industry, testified that cable operators would have the ability to respond to the Bortz survey fully and accurately without advance preparation. *See* Egan W.D.T. at 4, n.1; Allen W.D.T. at 4.

57. The CARP's criticism of the brevity of the survey in relation to its own task is perhaps a misperception of the respective tasks of the CARP in arriving at its royalty allocation determination and of the cable operator in responding to the Bortz survey. The CARP must evaluate thousands of pages of testimony and argument on what may be an unfamiliar subject from parties with competing theories fighting over hundreds of millions of dollars in royalties. *See, e.g.*, 1990-92 CARP Report at 24. In doing so, the CARP must consider the distant signal programming marketplace *in the aggregate* and in light of the changed circumstances in the industry as a whole.

58. By contrast, the individual survey respondent has a much different base of knowledge and a more limited task. Cable operators "are working off their own

experience from decisions that [they] have made about what they carry and what they don't . . . so . . . the measure provided by Bortz [is] something that would be answered by a cable operator during an interview with some authority and a well-informed decision." 1990-92 Tr. 5209 (Fuller) (D6:11). As indicated by Michael Egan in his testimony, the valuation of programming is made on a daily basis – it was his full time job to be making the kind of valuations asked of cable operators in the Bortz survey. *See* Egan W.D.T. at 4, n.1. Moreover, the cable system operators surveyed are aware of the demographics of their systems' markets and the kinds of programming that will increase demand for subscriptions. *See* Crandall W.D.T. at 8-9. Given that the cable operator is asked only about the relative marketplace value of distant signal programming on the respondent's cable system, the task confronting the cable operator is much easier – a cable operator with substantial familiarity with the programming being considered and the dynamics of the marketplace in the cable system's community is being asked to make a programming decision similar if not identical to the kinds of decisions that operator makes on a daily basis.

59. Indeed, the evidence shows that respondents to the various constant sum surveys being presented were able to make thoughtful judgments as to the value of programming. In the context of the Canadian survey, Professor Ringold noted, with respect to several questionnaires raised during cross-examination, that the respondents were acting deliberately in allocating relative values. *See* Tr. 5955-58 (Ringold). Such evidence is consistent with the testimony of Dr. Axelrod in the 1990-92 Proceeding, in which he noted that there is "ample" empirical evidence that the results of constant sum

surveys are highly predictive of marketplace behavior. *See* 1990-92 Axelrod W.R.T. at 3 (D3:13).

3. **Attitudes Rather Than Behavior**

60. The CARP's criticism that the Bortz survey measures only attitudes is counter to years of research showing that the constant sum methodology is highly predictive of marketplace behavior and the substantial marketplace evidence submitted by the JSC in this and prior proceedings. Moreover, in this proceeding, the results of the Rosston regression analyses – which intend to measure behavior – tend to support the conclusion that the Bortz survey is an accurate assessment of how cable operators would act in the marketplace absent the compulsory license.

61. As discussed in detail above in paragraphs 38-45-, there has been substantial support for the Bortz survey as a measure of how cable operators would act in the marketplace. A key element of support for this testimony is the fact that the constant sum methodology employed by the Bortz survey has been proven to be an accurate predictor of marketplace behavior. *See* 1989 Reid W.D.T. at 10-2 (D3:10). Dr. Ringold testified that when the predictability of survey research techniques are tested, the constant sum methodology proves to be the best (or tied for the best) predictor of marketplace behavior. *See* Tr. 5596-97 (Ringold). Thus, to the extent that the constant sum survey is an accurate predictor of behavior, the CARP's concern that the Bortz survey measures "attitudes" is unfounded. [14]

---

[14] In the 1989 Proceeding, Dr. Robinson, a witness for the NAB, testified that the Bortz survey is not really a measure of "attitudes" in the first instance. He stated that in social research, attitudes refer to likes vs. dislikes, which is not what the Bortz survey measures. Instead, it determines how cable operators *measure the marketplace value* of programming in the context of their experience in making programming decisions at their

Footnote continued on next page

62. In addition to the evidence that the constant sum methodology is a valid predictor of marketplace behavior, JSC have offered substantial evidence of actual marketplace behavior that corroborates the Bortz survey. Mr. Trautman's testimony reveals that, in the actual marketplace, sports programming is able to obtain a substantial premium over other types of programming. *See* JSC Ex. 1 at 17-24. Thus, as shown in Table III-3 of JSC Exhibit 1, over $1.5 billion was spent on JSC programming by a handful of cable networks for a approximately 200 hours of programming, whereas the A&E cable network spent only $300 million to acquire 14,000 hours of programming. *See id.* at 23. Similarly, Dr. Gruen's testimony offered evidence that ESPN had only 7-8% of the viewing of the top 11 cable networks, but commanded nearly 30% of the license fees of those networks and had to spend 30% of the total programming expenditures of those 11 cable networks to acquire its content. *See* Tr. 7629-38 (Gruen).

63. Furthermore, the Rosston regression analyses are, to some extent, responsive to the criticism that the Bortz survey does not accurately measure behavior.. The Rosston regression analyses measure the relationship between programming minutes carried by cable systems and their royalty payments, *see* Rosston W.D.T. at 2. Accordingly, Dr. Rosston describes the regression analyses as a measure of the *behavior* of cable systems. *See* Tr. 2646 (Rosston).

Footnote continued from previous page
systems. *See* 1989 Robinson W.D.T. at 4-5 (D3:11). It is for this reason, Judith Allen, who admits to not being a sports fan (an indicator of attitude), *see* Tr. 6012(Allen), can agree that sports programming has the highest marketplace value of programming on distant signals, *see* Allen W.D.T. at 4 (agreeing with near 40% allocation to sports).

64. Instead of undermining the relative marketplace values of the Bortz survey, Dr. Rosston's study of "behavior" supports those values. Because the results of Dr. Rosston's regression analyses are "relatively close" to the results of the Bortz survey, *see* Tr. 2920 (Rosston), it tends to confirm that the Bortz constant sum survey is an excellent predictor of cable operators' behavior in the marketplace, *see* 1990-92 Tr. 11245-46 (Axelrod) (R3:30) (stating that "[i]n the aggregate, [cable operator] behavior would very closely mirror" their responses to the Bortz survey). As discussed in the testimony of Dr. Crandall, the confidence intervals of both the Rosston regression analyses overlap with the confidence intervals of the Bortz survey for the JSC category. *See* Crandall W.R.T. at 3 and n.2. As Dr. Ducey testified, the results of the Rosston regression analyses corroborate the results of the Bortz survey. Tr. 1895 (Ducey). Accordingly, Rosston regression analyses (both the Greater-Than-Zero and Greater-Than-Or-Equal-To-One models), to the extent they are given weight by the Panel, provide a new and additional basis for crediting the results of the Bortz survey.[15]

4. **<u>Seller's Perspective /"Supply Side"</u>**

65. The 1990-92 CARP also criticized the Bortz survey for failing to take account of the "seller's side" or the "supply side" of the "supply and demand equation."

[15] To the extent that the Rosston regression analysis produces relative marketplace values similar to those generated by the Bortz survey, it would also confirm that the 10 minute responses to the key constant sum survey question accurately reflect the relative marketplace value of the different types of distant signal programming to the cable operator.

1990-92 CARP Report at 65-66. However, the CARP did not indicate how the purported failure to account for the "seller's perspective" affected the results of the Bortz survey.[16]

66. The "seller's perspective" issue was not new to the 1990-92 Proceeding. In the 1983 Proceeding, the CRT cited the testimony of Dr. Stanley Besen, a witness for the Program Suppliers in noting the "critical role" of the "supply side" in the marketplace equation. *See* 1983 CRT Determination, 51 Fed. Reg. at 12811. In the 1989 Proceeding, the CRT noted that the Bortz survey "does not take into account the seller's side." 1989 CRT Determination, 57 Fed. Reg. at 15301. Putting the "seller's side" into practice in the 1989, the CRT noted that the 4% allocation to devotional programming "represented only the buyers' side." *See* 1989 CRT Determination, *Id* at 15303. The CRT questioned then whether "[i]f cable operators went into the marketplace, would they find the price of devotional programs much cheaper, or even zero?" *Id.*

67. In prior proceedings, NAB, PTV and the Devotionals sponsored witnesses that testified that the CRT or the CARP should not take the seller's perspective into account. These witnesses, in one way or another, attempted to reject the principle that a particular seller's negotiating position or power was relevant in allocating royalties from the compulsory license fund. *See, e.g.* 1990-92 Clark W.D.T. at 4-8 (D3:7) (Devotional witness); 1990-92 Scheffman W.R.T. at 17-20 (D4:24) (PTV witness); 1990-92 Much W.D.T. at 2-6 (D4:20).

---

[16] In this regard, the 1990-92 CARP treated the Bortz survey unfairly in comparison to the Nielsen viewing study. In its report, the 1990-92 CARP dismissed certain criticisms of the Nielsen study because the effects of those criticisms could not be quantified. *See* 1990-92 CARP Report at 43-44. No party, however, in the 1990-92 Proceeding quantified the effect of the "seller's perspective" on the Bortz survey results.

68. The NAB has traditionally been the lead opponent of any consideration of the "seller's perspective." In the 1990-92 Proceeding, the NAB sponsored the testimony of Paul Much, a financial consultant, who contended that "it would not be appropriate to adjust the cable operator's relative valuations for perceived differences in the respective motivations of particular sellers." 1990-92 Much W.D.T. at 5 (D4:20). Mr. Much likened the compulsory license situation to that of a "forced sale" situation in the corporate securities context, in which the value to the buyer determines the price to be paid to the party being forced to sell. *See id.*

69. Similarly, during the rebuttal phase of this proceeding, the NAB offered the testimony of Dr. Andrew Joskow to criticize the use of the "seller's perspective." Dr. Joskow testified that there is no need to "adjust current marketplace valuations made by cable operators . . . to take into account 'supply side' factors such as supposed relative bargaining strength of sellers." Joskow W.R.T. at 4. In support of his conclusion, Dr. Joskow argued that, because programming in the hypothetical marketplace would be fixed to represent the programming packages actually carried, the "demand side" would determine the relative values of each type of programming.

70. Even if the Panel were to follow precedent and consider the "seller's perspective," there would be no reason for it to allocate JSC less than their Bortz survey share. *See* Crandall W.D.T. at 7. Upon reviewing the 1990-92 CARP Report, Dr. Crandall found no evidence that "seller's side" considerations would lead to the JSC to have a relative willingness to supply programming at a lower price than other claimants.

See id. at 11. Indeed, there is ample evidence to the contrary.[17] Accordingly, Dr. Crandall concluded that there was no economic basis to award the JSC a share of the royalties so severely discounted from their share in the Bortz survey. *See id.* at 11-12.

71. On the contrary, Dr. Crandall noted that, when it comes to negotiating with cable operators, sports programmers could be no "weaker" than broadcasters. He noted that broadcasters have demonstrated a greater interest in securing carriage on cable systems and making their programming available to as many cable system subscribers as possible at the lowest possible price. *See id.* at 12. In other words, the broadcasters – here represented by the NAB – might have a profit-maximizing interest external to their status as sellers of copyrighted programming to distant cable systems in setting the price for that programming. *See* Hazlett W.D.T. at 39 (noting that broadcasters pursued market changes that lowered payments into the cable royalty funds in order to achieve other priorities). Indeed, the NAB supported a rate regulation scheme before the FCC that would have reduced the rates for the broadcast tier of service – which forms the revenue base for the cable royalties – to $4.50 per subscriber per month, which would have caused an approximately 75% decrease in cable royalties. (*See* JSC Ex. 2) (advocating a methodology that would have yielded an average broadcast tier rate of $4.50 per month); Hazlett W.D.T. at 14 (noting that, in 1992, the average rate for the broadcast tier equaled $16.17 per month).

---

[17] *See* JSC Ex. 1 at 20-24 (describing the growth of expenditures on JSC programming); Egan W.D.T at 4 ("It is commonly known in the industry that sports programming is the most expensive genre of non-premium programming."); Allen W.D.T. at 5-6 ("It became an accepted (but unwanted) fact in the industry that sports programming is the most costly type of programming.").

72. It is important to note that, to the extent that the "seller's side" is relevant, it applies to all of the quantitative studies presented by the parties. As Dr. Ducey testified, the Rosston regression analysis "doesn't really model a free market seller's perspective." Tr. 1899 (Ducey). As Dr. Crandall noted in the 1989 Proceeding, the Nielsen study also does not take the "seller's side" into account. *See* 1989 Crandall W.D.T. at 7 (D2:8). Similarly, there is no indication that Dr. Fratrik, Dr. Johnson or Dr. Boyle took the "seller's side" into account in preparing their quantitative analyses.

5. **Professor Johnson's Criticisms**

73. Dr. Leland Johnson presented several criticisms of the Bortz survey in his written rebuttal testimony. These criticisms represented a change in position by Dr. Johnson, who, in his direct testimony, agreed with the 1990-92 CARP that the Bortz survey is "highly valuable in determining market value," Johnson W.D.T. at 27 (citing 1990-02 CARP Report at 66), and stated that the survey is "also attractive in focusing directly on relative valuations of PTV and other program categories," *id.* at 30.[18] Notwithstanding his former enthusiasm for the Bortz survey, and PTV's espousal of the Bortz survey in the 1990-92 Proceeding.[19] Dr. Johnson downgrades his assessment of the utility of the survey from "highly valuable" to being "potentially useful." *See* Johnson W.R.T. at 17.

74. Dr. Johnson stated four substantive criticisms of the Bortz survey in his written rebuttal testimony: (1) the exclusion of cable systems that carried PTV only as a

[18] Indeed, as will be discussed more in depth below, each of PTV's witnesses contradicted their direct testimony when submitting rebuttal testimony in order to suit PTV's changing perceptions of the best means to maximize its royalty allocation.
[19] *See* 1990-92 PTV Proposed Findings at 80-82.

distant signal; (2) the failure of the survey to show an increase to the PTV share in light of the WTBS conversion for 1998 and 1999; (3) the failure to exclude non-compensable WGN programming from the survey; and (4) the need for the survey to be adjusted to take account of the 3.75% fund. Dr. Johnson only raises the first and third criticisms in the context of pointing to Dr. Fairley's adjustments. Those adjustments are discussed in paragraphs 85-112 below. Accordingly, only Dr. Johnson's second and fourth criticisms will be addressed here.

a. **<u>"Lack Of Responsiveness"</u>**

75. Dr. Johnson also criticizes the Bortz survey in his rebuttal testimony for failing to show a "seismic change" as a result of the "shift of WTBS from the compulsory license pool to cable network status at the end of 1997." Johnson W.R.T. at 20. Dr. Johnson's theory is that because movies and syndicated series formed a large portion of the programming on WTBS, the cable operator survey should have revealed a diminution in the value of those categories from the 1997 survey to the 1998 survey. *See id.* at 21. Dr. Johnson, however, does not actually *quantify* the size of the drop he would expect in the shares of the movies and syndicated series – it thus is not clear whether a three-point, five-point or ten-point shift would satisfy his desire to see a "seismic change" in the Bortz survey.

76. The fundamental flaw in Dr. Johnson's theory is that the "seismic shift" he predicts is logically unlikely to be seismic.[20] As Dr. Johnson noted himself in his direct

[20] Dr. Johnson's "lack of responsiveness" theory is, in its essence, circular in its reasoning. Dr. Johnson assumes that the cable operator survey of relative marketplace value should show a "seismic shift" because the WTBS conversion was a "seismic shift" in the relative marketplace value being studied. *See* Johnson W.R.T. at 21.

testimony, each of the programming categories except for PTV and Canadian programming, was represented on WTBS. *See* Johnson W.D.T. at 3. The conversion of WTBS to a distant signal would not necessarily reduce the *relative* value of those programming categories – movies, syndicated series, sports, news and public affairs, and devotional programming – with regard to each other. Logically, under Dr. Johnson's theory, their relative value would be reduced only when another programming category not carried on WTBS was carried by the cable system. Therefore, the "seismic shift" would only occur for that minority of cable systems that carried PTV signals or Canadian signals *in addition to WTBS.*

77. Indeed, if Dr. Johnson's theory were put to the evidence in this proceeding, one would expect only slight changes in the Bortz survey shares for the various programming categories. As noted in the testimony of Mr. Fuller and Mr. Trautman, the systems carrying PTV distant signals represent less than 25% of all Form 3 systems. *See* Tr. 3301-02 (Fuller) (noting that roughly one-fourth of all Form 3 systems carried a PTV distant signal); Tr. 413 (Trautman) (noting that only 37 of the 138 cable systems responding to the 1998 Bortz survey carried a PTV distant signal). Thus, even though for a particular cable operator carrying WTBS and a PTV distant signal the relative marketplace values may have changed by several percentage points, in the aggregate, the change in the survey results would be very small. The significant individual swings in valuation by a minority of systems will inevitably be smaller on an all-Form-3-system basis.

78. Assuming that the 25% of Form 3 cable operators carrying PTV distant signals assigned an average value of 12% to the PTV category in 1997[21], even a 50% increase in that allocation to 18% after the WTBS conversion would result in, *at most*, an increase of 1.5% (6% * 25% of systems) to the PTV share in 1998. The resulting 1.5% increase would be subtracted *pro rata* from the other categories – resulting in reductions that would likely fall within the confidence intervals of the other programming categories. *See* JSC Ex. 1 at 54 (identifying the confidence intervals for each programming category in the 1998 Bortz survey). Moreover, given that a number of systems would be carrying only a PTV distant signal after the WTBS conversion, the expected increase would be even smaller because those systems would not be surveyed.[22] As such, even if Dr. Johnson's theory is correct that the PTV share should increase and movies and syndicated series should decrease in light of the WTBS conversion, the magnitude of the change to the movies and syndicated series categories could not be said to be statistically insignificant.

79. Moreover, Dr. Johnson's theory falls into the trap of assuming that cable operators blindly adhere to rigid formulas for determining the value of the distant signals they carry based on the values they assigned in prior proceedings. He does not consider the possibility that, for example, the remaining commercial distant signals carried by cable systems would become more valuable as a reasonably priced source of programming after

[21] This 12% value is consistent with the average value given to the PTV category by respondents in the 1998 Bortz survey. *See* Tr. 409 (Trautman); PTV Ex. 3-X.

[22] For this reason, Mr. Trautman acknowledged that there must be some accounting for the PTV-only systems. Mr. Trautman's methods result in a positive adjustment of 0.6% for the PTV category. *See* Trautman W.R.T. at 4-8.

the WTBS conversion. *Cf.* Egan W.D.T. at 5-6 (noting that the price paid for WGN was "quite reasonable" in comparison to what his cable system was required to pay for other sources of sports programming). Dr. Johnson further does not consider the fact that a large percentage of the PTV distant signals carried by cable systems are partially distant signals, and therefore potentially carried only as a result of must-carry obligations and of little or no value to cable operators. *See* Hazlett W.D.T. at Appendix D at D-1 (showing that 187 of the 585 instances of carriage of PTV signals – 32% - were partially distant instances); Tr. 891 (Hazlett) (discussing the potential must-carry aspects of partially distant signals).

b. **3.75% Adjustment**

80. Dr. Johnson contends that an adjustment should be made to the PTV share of the Bortz survey to account for the fact that PTV does not participate in the 3.75% fund. Though Dr. Johnson claims his point is "unimpeachable," *see* Johnson W.D.T. at 28-29, it has been rejected by both the CARP and the CRT because it misconstrues the basis of the survey, *see* 1990-92 CARP Report at 124; 1989 CRT Determination, 57 Fed. Reg. at 1295.

81. The Bortz survey asks cable operators how they value the different types of distant signal programming on their systems without regard to the royalties they actually pay for the signal on which the programming appears. The survey results provide evidence of the relative valuation of all of the claimant groups in a free market, where license fees are not set by the government, but determined by the market.

82. Prior CRT/CARP decisions have concluded that each of the different funds has a different set of permissible claimants, depending on the programming types generating contributions to the funds. Unless the Panel reverses these decisions, and there has been no argument that it should, the Panel should apply the Bortz results on a fund-by-

fund basis. Thus, CRT precedent provides that the Syndex Fund may only be claimed by syndicated series claimants, movie claimants and musical work owners. *See* 1983 CRT Determination, 51 Fed. Reg. at 12814. Because the Syndicated and Movie claimants are represented by the same party here, it is not necessary for the Panel to determine their relative share. If it were, however, the Bortz survey results – by removing the categories that cannot claim the fund -- would provide the best evidence of how the free market would value the two categories of distant signal programming on a relative basis. The survey asks systems who actually carry the programming at issue how they value that programming on a relative basis.

83. Similarly, with respect to the 3.75% Fund, the CRT has ruled that only Program Suppliers, JSC, NAB, Music, Canadian Claimants and the Devotional Claimants can claim the fund. Again, the Bortz survey, with other claimants removed, shows the best estimate of relative free-market value for these claimants. Finally, with respect to the Basic Fund, the Bortz results can be applied without removing any claimants. (Indeed, the Panel will need to add an award for Music.)

84. Dr. Johnson's argument that PTV should essentially get its share of the 3.75% Fund reflected as a higher award of the Basic Fund is the wrong approach for two reasons. First, Dr. Johnson's argument assumes that the Bortz survey results are tied to the cost of the distant signals carried. In other words, he assumes that the results of the Bortz survey would be different if the actual cost of the distant signals carried was different – i.e., if all of the signals carried a Basic Fund cost. As numerous witnesses have testified, however, the survey is designed to measure value and is independent of cost. Indeed, PTV focussed heavily in its case on the point that value to the cable operator is

distinct from the cost of the signal. Second, Dr. Johnson's argument is in essence an effort to overturn the prior decisions regarding which claimants are entitled to claim which funds. If the Panel wishes to revisit that issue, it should do so directly.

6. **Professor Fairley's Adjustments**

85. PTV presented the testimony of Dr. William Fairley to make certain "adjustments" to the Bortz survey. The purpose of Dr. Fairley's testimony was not to criticize the methodology of the Bortz survey or to state that its results were unreliable or invalid; Dr. Fairley testified that the Bortz survey is "basically well-conducted," and that he "technically" did not "have much of a problem with a great many features of it." Tr. 9932-33 (Fairley). Dr. Fairley similarly testified in the 1990-92 Proceeding that, when reviewing the Bortz survey, that other than the "automatic zero" issue he "didn't see something else in the design or execution [of the] survey that was a problem. . . ." 1990-92 Tr. 5812 (Fairley) (D3:26); *see also id.* at 5811-5815 (noting that he developed a checklist for reviewing survey research and the Bortz survey passed all of the checks). Instead, Dr. Fairley's testimony was intended to adjust for certain "biases" against PTV that he believes to exist in the Bortz survey. *See* Fairley W.R.T. at 3. Dr. Fairley testified that the Panel can rely on the Bortz survey with his adjustments. *See* Tr. 10014 (Fairley).

86. Dr. Fairley offered three adjustments to the Bortz survey to correct what he sees as "biases" against PTV: (1) an adjustment for the PTV-only and Canadian-only systems that were excluded from the eligible sample; (2) an adjustment for the fact that an "automatic zero" was given to the PTV category if a PTV was not carried by the cable system; and (3) an adjustment of the Program Suppliers' categories to take into account the amount of non-compensable programming on WGN. *See* Fairley W.R.T. at 3-4.

a. **PTV-Only and Canadian-Only**

87. Dr. Fairley contends that the results of the Bortz survey must be adjusted to account for the systems excluded because they carried only a PTV or Canadian distant signal. *See id.* at 12-13. Dr. Fairley described this adjustment as necessary to correct the "skew" in the results from the exclusion of systems that carried PTV and would otherwise have been eligible to assign a value to the PTV category. *See id.* at 13.[23]

88. In recognizing that the Panel must take into account the PTV-only and Canadian-only, Dr. Fairley is in agreement with Mr. Trautman, the sponsor of the Bortz survey. Mr. Trautman testified that, "there's clearly a value to be assigned to those systems. . . . I wouldn't do it in the context of our survey, but I think that that should be taken into account, yes." Tr. 464 (Trautman). He further stated that he "accept[ed] the notion that you should take the 2 percent or so of the royalty fund that is accounted for by those systems and look at that separately from the allocations made in the context of [the Bortz] survey because we didn't survey those systems." Tr. 470 (Trautman); *see also id.* at Tr. 471 ("I believe that some separate evaluation should be conducted related to the PTV only situation"). Indeed, Mr. Trautman's rebuttal testimony includes two methods for accounting for the PTV-only systems. *See* Trautman W.R.T. at 4-7.

---

[23] Dr. Fairley "recognized" the explanation for excluding PTV-only and Canadian-only systems from the constant sum survey. *See* Fairley W.R.T. at 13. Indeed, the exclusion of PTV-only systems is necessitated by the use of the constant sum survey methodology. As Dr. Ringold testified, the constant sum methodology reveals *comparable* judgments on items. Tr. 5593-94 (Ringold). The constant sums scaling technique is employed to determine how proportions are allocated *among two or more alternatives.*" 1989 Reid W.D.T. at 6 (D3:10). For those systems carrying a PTV station as their only distant signal, the survey respondents would not be able to compare the relative values of different programming types (i.e., the PTV category would be the only category), thus rendering the use of the constant sum survey technique inappropriate. *See* Tr. at 258 (Trautman).

(i) Trautman Approaches

89. Mr. Trautman proposed two approaches for dealing with the PTV-only and Canadian-only systems. Both of the approaches yield similar results for the PTV and Canadian programming categories. The first approach was to simply remove the PTV and Canadian categories from the survey altogether and assign PTV and Canadian Claimants their fee-generated share of the royalties. *See id.* at 4-5. This approach used the same methodology as used by Jonda Martin in her testimony at pages 7-9. The Canadian Claimants' share would be adjusted by the results of Dr. Ringold's constant sum survey of the value of programming on Canadian signals. This approach was used by the 1990-92 CARP in establishing the award for the Canadian claimants. *See id.* at 4.

90. Mr. Trautman's second approach involved applying the Bortz survey results to that portion of the cable universe eligible for inclusion in the Bortz survey, i.e., those systems carrying one or more U.S. commercial station as a distant signal. *See id.* at 6. These shares were then adjusted by crediting PTV and the Canadian Claimants for the portion of the universe represented by the systems carrying only PTV or Canadian signals. *See id.* The adjustments were weighted by the amount of fees paid for carriage of the PTV or Canadian signals to generate adjusted Bortz survey shares. *See id.* at 6-7. In this regard, the accommodation for the PTV-only and Canadian-only systems matches the weighting given to the system included in the Bortz survey. This adjustment is not the subject to the arbitrariness created by the sliding scale of royalty payments; when only one signal is carried; there is no "which is the first DSE" question when only one type of signal is carried. *See id.* at 6.

91. Mr. Trautman's approaches account for the amounts of royalties paid by PTV-only and Canadian-only systems for the carriage of PTV or Canadian signals. In

doing so, his adjustments account for any distortions caused by the minimum fee payments by those systems. A cable system carrying only one distant PTV signal would pay a minimum fee of 1.0 DSE rather that the 0.25 DSE rate applicable to PTV signals. *See id.* at 6-7. Mr. Trautman's method treats 75% of that payment as a "minimum fee" payment that would be allocated in the same way as the royalties from the systems carrying zero distant signals. *See id.* at 7.

92. Mr. Trautman's method thus removes the particularly distorting effect caused by the cable systems carrying only a *partially* distant PTV signal. As noted by Mr. Trautman, a substantial portion of the royalties paid by PTV-only systems are paid by those systems that carry their PTV distant signal as a partially distant signal. *See id.* at n. 5. As shown in Appendix D, approximately 45% of the royalties paid by PTV-only systems are paid by systems that carry only partially distant PTV signals. *See id.* at Appendix D. The carriage of these signals may be the result of the PTV station's decision to invoke its must-carry rights, and the cable operator may not place *any* value on that signal. *See id.* at 7 n.5; Fairley W.R.T. at 24. The vast majority of these systems carrying the partially distant signal as duplicate to one or more local PTV signal. *See* Trautman W.R.T. at Appendix E (identifying partially distant PTV-only systems and total number of PTV signals carried). Indeed, only two cable systems partially PTV distant signals – signals that are "distant" to only 37% and 13% of their subscribers, respectively - account for approximately *22%* of the royalties paid by PTV-only systems. *See id.* In both cases, the cable system already carries two *local* PTV signals. *See id.*

(ii) Fairley Approaches

93. Dr. Fairley adjusts the Bortz survey results to take into account the PTV-only (and Canadian-only) systems in two ways: (1) the "Method 3" approach, which

assigns a 100% value to the PTV-only systems and then includes those systems with the other respondents, *see* Fairley W.R.T. at 47; and (2) the "Method 2" approach, which includes the PTV-only and Canadian-only systems, but does not assign 100% of the value on those systems to PTV, but instead assigns some value to other categories, *see id.* at 61.[24]

94. Dr. Fairley's inclusion of values for the PTV-only and Canadian-only systems with the Bortz respondents have a disproportionately large impact on his final adjustments versus his other adjustments. Whereas in Method 2, his other adjustments increase the PTV share by 1.77%, the PTV-only adjustment increases the PTV share by 3.04%. *See* PTV Ex. 9-R (combined 1998-99). In Method 3, the effect is greater – the PTV-only adjustment increases the share by 3.95% vs. 1.07% for the "threshhold effect" and WGN adjustments. *See* PTV Ex. 10-R.

95. There are at least two flaws in Dr. Fairley's PTV-only adjustment. First, Dr. Fairley's assumption that the PTV-only systems would assign a high value or 100% value to the PTV programming category is contradicted by his own testimony. Dr. Fairley conceded in his testimony that "it is possible that a system could give PTV a zero share if the signal was partially distant and being carried pursuant to local 'must carry' rules." Fairley W.R.T. at 24. Yet his PTV-only adjustment does not acknowledge this possibility, even though 31 of the 166 PTV-only Form 3 systems in 1998 and 1999 – approximately 20% of the PTV-only systems - fit this category. *See* Trautman W.R.T. at 6 Table 2

[24] Dr. Fairley did not account for the PTV-only and Canadian-only adjustment in applying his "Method 1." Tr. 10416-17 (Fairley).

(showing 87 PTV-only systems in 1998 and 79 PTV-only systems in 1999); *id.* at Appendix E (identifying 13 partially distant-only systems in 1998, 18 in 1999).

96. Secondly, the use of unweighted data by Dr. Fairley significant increases his calculation of the PTV-only adjustment. Although the Bortz survey is weighted by the amount of royalties paid by each system, *see* Tr. 246-47 (Trautman) Dr. Fairley's adjustment does not take this weighting into account, *see* Tr. 10621 (Fairley). As shown by the data in the rebuttal testimony of Mr. Trautman, PTV-only systems paid $2.59 million of the $103.8 million in royalties paid by Form 3 systems in 1998 and 1999. *See* Trautman W.R.T. at 6, at Appendix D.[25] Accordingly, the weighting of those systems would result in a *maximum* adjustment of 2.50% to the PTV share – 0.54% less than his Method 2 adjustment and 1.45% less than his Method 3 adjustment.

b. **Automatic Zero/Threshold Effect**

97. Dr. Fairley believes that it is necessary to adjust the Bortz survey to correct for a "threshold effect" he believes biases the survey results against PTV. He contends that cable systems may have placed a value on PTV programming even though that value did not meet a certain "threshold" of value for taking on the costs of importing an entire PTV signal. *See* Fairley W.R.T. at 6. Dr. Fairley contends that these systems would unfairly have been assigned an "automatic zero" for PTV programming under the Bortz survey methodology despite valuing PTV programming. *See id.* Dr. Fairley describes this as a bias against PTV because the categories of commercial programming (movies,

[25] The $2.6 million PTV-only figure is derived by adding the totals for "Systems with Distant PBS Only" in 1998 and 1999 from Table 2. The $103.6 figure is derived by adding the totals in Table 2 with the total royalties paid by all other Form 3 systems (those with one or more U.S. commercial distant signals) in page 1 and 2 of Appendix E.

syndicated series, sports, news and public affairs, and devotional programming) may be assigned value even though that programming may not have been carried if the cable operator was entitled to alter the mix of programming (e.g., by deleting devotional programming and replacing it with news programming). *See id.* at 8.

98. In support of his automatic zero/threshold effect argument, Dr. Fairley points to one system that carried a minimal amount of sports programming but assigned a substantial value to the sports category. *See id.* at 7. He also speculates that "it is not clear that all distant signals will include devotional programming." *Id.* Dr. Fairley does not substantiate this theory by offering any analysis of the signals carried by systems responding to the Bortz survey. Mr. Trautman, however, testified that he believed that the one system cited by Dr. Fairley was an "isolated example." Tr. 10329-30 (Trautman); *see also* Tr. 446 (Trautman).

99. Dr. Fairley employed three different "methods" to account for the "automatic zero" adjustments – Method 1, Method 2, and Method 3. Each method is described briefly below and is followed by an analysis of Dr. Fairley's "automatic zero" theory and methods.

* Method 1. Method 1 involved the use of a regression prediction of survey responses based upon the relations between answers to the preliminary questions of the Bortz survey, questions two and three, and the answers to the key constant sum question. *See* Fairley W.R.T. 29-30. In this regard, the Fairley regression prediction used in Method 1 replaces the *actual* responses of cable operators to the Bortz survey. *See id.* at 31. Dr. Fairley's Method 1 is thus intended to account for the "automatic zeros" given when a cable system does not carry a PTV system as its only distant signal. *See id.* at 27.

* Method 2. In Method 2, Dr. Fairley attempts to adjust for the "automatic zeros" given to the PTV category by estimating the value of PTV programming to the cable operators for whom the "automatic zeros" were assigned. *See id.* at 33. Dr. Fairley used

this method in his testimony in the 1990-92 Proceeding. Tr. 9964 (Fairley).[26] Method 2 assumes that the value of PTV programming lies somewhere between zero and the "threshold" for carriage of programming for a system, which Dr. Fairley defined as the lowest share the respondent gave to any category, be it 5, 10, 20 or 50. *See* Fairley W.R.T at 39. These values were defined on a random basis, based on a statistical distribution selected by Dr. Fairley.

* Method 3 Method 3 addresses the "automatic zero" from a different angle than Method 2. Whereas in Method 2 Dr. Fairley assigns a value to PTV where a PTV signal is not carried, in Method 3, Dr. Fairley *takes away* value from other programming categories that he assumes would not be carried in the hypothetical marketplace because they do not reach a "threshold" level of value. *See* Fairley W.R.T. at 44. The "threshold" level of value is defined in relation to the "smallest share, other than zero, that each system gives to a category it rated." *See id.* at 46. As Dr. Fairley describes it, "the bulk of systems are assumed to be assigning shares of 10 or below to categories they would not carry if they had the choice." *Id.* at 46. When Dr. Fairley predicts that the program category would not be carried due to his threshold determination, he assigns that category a zero value and redistributes the actual values assigned by the cable operators to the other categories. *See id.* at 47. Under the threshold adjustment employed in Method 3, the sports share increases – presumably because fewer of its values are subject to the "threshold effect." Tr. 10643 (Fairley) ("sports benefits, especially for Method 3 compared to Method 2.").[27]

(i) Method 1

100. Dr. Fairley's Method 1 cannot be used as basis for adjusting the Bortz survey to account for the "automatic zero" effect. First, Dr. Fairley conceded that Method 1 was based upon a fundamentally flawed premise. Dr. Fairley's basis for employing a

---

[26] In the 1990-92 Proceeding, Dr. Fairley calculated these values using a "Geometric" distribution, while in this proceeding, he used a "Beta Negative Binomial" distribution, which yields a greater share for the PTV category. *See* Tr. 9966-97 (Fairley); Fairley W.R.T. at 39.

[27] Indeed, as noted by Mr. Trautman in his testimony, one system assigned a 100% value to live professional and team sports – indicating that the only type of programming the operator was willing to pay for on the signal(s) it imported was the sports programming, even though it carried other types of programming. *See* Tr. 491-92.

regression prediction based upon the response to the preliminary questions was that those questions did not suffer from a bias against PTV. *See* Fairley W.R.T. at 27. Dr. Fairley belief was that a cable operator could provide an answer identifying PTV programming regardless of whether that cable operator carried a distant PTV signal. *See* Tr. 10001-02 (Fairley).[28] Dr. Fairley stated that Method 1 could not be used if the cable operator was not asked about PTV programming in the preliminary questions if the operator's system did not carry a PTV distant signal. *See id.* at 10002, 10003 (Fairley) (Q: And your results [under Method 1] rest on that understanding, correct? A: Yes).

101. However, as indicated in the questionnaire attached as Appendix B to JSC Ex. 1 (the Bortz study), cable operators are asked the preliminary questions about programming popularity and use of programming in advertising with regard to the distant signals they actually carried. Dr. Fairley did not actually read the Bortz survey questionnaire before submitting his report. *See id.* at 10009 (Fairley). Upon reading the language of these questions, Dr. Fairley concluded that survey respondents could not identify PTV programming if a PTV distant signal was not carried. *See id.* at 10006 (Fairley). While Dr. Fairley later indicated that this fact did not change the results of Method 1 "numerically," *see* Tr. 10605 (Fairley), Dr. Fairley did not contend that the premise of Method 1 – that respondents could identify PTV programming whether it was carried or not – was accurate. To the extent that Dr. Fairley did suggest that Method 1 was useful after this flaw was revealed, such an "about face" on the issue should be given

[28] Dr. Fairley's belief was based upon a misunderstanding of Mr. Trautman's testimony. *See* Tr. 10003. Mr. Trautman testified that while the questions were asked on an "unaided" basis as to programming categories, the respondents were asked about programming in the context of the stations listed for them. *See* Tr. 239-40 (Trautman).

little credibility in light of his stated belief that could not "see a rescue" for Method 1 if his premise were false. Tr. 10002 (Fairley).

102. *Second*, Dr. Fairley's use of the responses to the preliminary questions of the Bortz survey is statistically dubious. As explained in JSC Exhibit 1, the responses to the preliminary questions, Questions 2 and 3, are subject to wide confidence intervals. *See* JSC Ex. 1 at 54. For example, in 1998, the 9.1% result for PBS is subject to a confidence interval of ±7.5%; meaning that the "real" number could be as low as 2.6% and up to 16.6%. *See id.* Furthermore, approximately 15% of the respondents answered all parts of Question 3, meaning that the confidence interval for the PTV category was ±29.8%, even though the number reported was only 14.9%. *See id.* at 56.

(ii) Methods 2 And 3.

103. Dr. Fairley's Automatic Zero/Threshold Effect theory as applied in Methods 2 and 3 contain several faulty premises that preclude its acceptance. As an initial matter, the valuation of programming not carried or the de-valuation of programming actually carried would be inconsistent with the hypothetical marketplace the Panel must construct and the Copyright Act. As the CARP held in the 1990-92 Proceeding, the purpose of the hypothetical marketplace being constructed is to determine the "relative value of programming *actually broadcast* in terms of attracting and retaining subscribers." 1990-92 CARP Report at 65 (emphasis added). The CARP in the 1990-92 Proceeding expressed grave concern over accepting adjustments based upon assigning value to programming not actually carried, but felt that it required to because the adjustments went unchallenged. *See* 1990-92 CARP Report at 124. Furthermore, as a matter of law, programming that is not carried on a distant signal basis would be ineligible for royalties under the compulsory license. *See* 17 U.S.C. § 111(d)(3) (2000) (allowing royalty claims

for only those copyright owners whose works are retransmitted distantly). Despite these legal constraints, Dr. Fairley testified that his automatic zero adjustments either compensate PTV for programming that was below the value necessary for purchase in the marketplace (Method 2), *see* Tr. 9994-95 (Fairley), or disgorge the value of programming that Dr. Fairley predicts would not be carried in the marketplace (Method 3), *see* Tr. 10631 (Fairley). As such, his "automatic zero" adjustments are infirm as a matter of law.[29]

104. Moreover, Dr. Fairley's theory is economically unsound. Both Dr. Joskow and Dr. Crandall testified that it would be improper as a matter of economic theory for the Panel to assign relative values based on a marketplace in which the carriage of programming was different from that what was actually carried. *See* Joskow W.R.T. 8-9; Crandall W.R.T. 5-6 ("Without some grounding in the actual choices made by cable operators, it would be impossible to say anything about the hypothetical market for distant signals"); *see also* Trautman W.R.T. at 2 (noting that in actual marketplace, cable systems cannot carry all available networks that may have value and that cable networks not carried receive no marketplace compensation). Dr. Joskow testified that it would be inappropriate to make any adjustments to the Bortz survey based on programming not actually carried. *See* Tr. 9025 (Joskow) ("Q: Okay. You should not adjust the Bortz results to account for any kind of programming that is not carried. A: Correct.").

---

[29] As discussed in paragraphs 230-232 below, in any event, the Method 2 and Method 3 adjustments for the "automatic zero/threshold effect" proposed by Dr. Fairley both result in the JSC having a higher "starting point" Bortz share in the 1998-99 Proceeding than in the 1990-92 Proceeding.

105. Finally, Dr. Fairley's "automatic zero/threshold effect" adjustments fail the very purpose they were intended to correct – the equal treatment of all program categories. Dr. Fairley's automatic zero adjustment in Method 2 and his threshold effect adjustment in Method 3 do not allow for the possibility that cable operators might value other programming categories not carried. As Mr. Trautman testified, a cable operator may attach some value to commercial distant signal programming *not* carried, such as sports or movies on an independent signal that would be subject to the 3.75% rate. *See* Trautman W.R.T. at 2. Dr. Fairley acknowledged this possibility. *See* Tr. 9999-10000 (Fairley) ("you can expect that [the importation of an additional independent station] would have some influence on [] that system's valuation"). Accordingly, a system that gave the "live professional and team sports" category a low value because it only imported a regional independent station with a limited amount of sports programming might actually assign a higher value to sports programming if it carried WGN, but does not carry WGN because of the 3.75% royalty rate it would have to pay. Recognition of such a value might mean that the value assigned a sports category is not dropped under Method 3 because it falls below the "threshold" level. Dr. Fairley made no attempt to adjust for the possibility that commercial programming not carried might have value. *See id.* at 10001-02.

c. **<u>WGN Substitution</u>**

106. Dr. Fairley also makes an adjustment to the Bortz survey results to account for what he perceives as the "systematic" inflation of the Bortz survey shares of the Program Suppliers category because approximately half of the programming carried nationally on WGN's satellite signal is non-compensable. *See* Fairley W.R.T. at 4, 18. Dr. Fairley's understanding was that all of the non-compensable programming was in the Program Suppliers' category, *see id.* at 18, and that cable operators were not made aware

of the substitution of programming, *see id.* In order to "correct" this flaw, Dr. Fairley adjusts the Syndicated and Movies shares *pro rata* for the proportion of hours that are compensable, after accounting for any other signals that might be carried. *See id.* at 19. Despite his criticism, Dr. Fairley does not offer a concrete suggestion to revise the methodology of the Bortz survey to exclude non-compensable programming.

107. While Dr. Fairley's WGN adjustment is new in this proceeding, the issue of the non-compensable programming is not. In the 1990-92 Proceeding, the JSC submitted the testimony of Peter Lemieux, who calculated that 21% and 29% of the programming on WGN and WWOR was non-compensable, respectively, during a period in which they were two of the three most widely carried superstations. *See* 1990-92 Lemieux W.D.T. at 20 (D5:36). No adjustment to the Bortz survey to take into account the non-compensability of WGN and WWOR programming was recommended by the parties, nor did the CARP raise the issue on its own. It is thus difficult to imagine why Bortz Media would adjust its methodology to account for an issue that was present but ignored by the parties in the last proceeding.[30]

108. Regardless of the timing of Dr. Fairley's adjustment, his attempt to adjust the Bortz survey for the non-compensability of programming on WGN has three serious defects: (1) it equates the amount of programming time with programming value – a concept long since rejected in distribution proceedings; (2) it fails to account for the

[30] Dr. Fairley does not suggest that the WGN issue demonstrates a bias in the survey against PTV or in favor of the JSC; indeed, the JSC's share *increases* under the WGN adjustment. *See* Fairley W.R.T. at 18; PTV Ex. 9-R (showing the effect of the WGN adjustment on the sports category).

difference in non-compensability between the movies and syndicated series category; and (3) it ignores that the non-compensability issue would affect the Devotional category.

109. *First*, Dr. Fairley's adjustment is flawed inasmuch as it makes a straight-line reduction in the value of the syndicated series and movies category based on the amount of programming time that is non-compensable. It has long been a tenet of distribution proceedings that time does not equate with value. *See* 1978 CRT Determination, 45 Fed. Reg. at 63037 (stating that "an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming"); 1980 CRT Determination, 48 Fed. Reg. 9563 ("the Tribunal does not view time-based considerations as any more than of limited value"); 49 Fed. Reg. 37653, 37655 ("the total number of hours of categories of programming on distant signals provides limited guidance to a reasonable allocation of cable royalties"). Mr. Trautman testified that cable operators may place value on different syndicated series or other programs, making a mechanical application based on hours not "the salient issue." Tr. 526 (Trautman).

110. Indeed, an inspection of PTV Exhibits 12-X and 13-X, which are the comparable national and local schedules for WGN during a week in 1998, reveals that a large portion of the compensable programming may be of lower value than the compensable programming. For the most part, the prime-time syndicated series programming on WGN (from 7-10 p.m.) is compensable. *Compare* PTV 12-X *with* PTV 13-X. Similarly, a substantial amount of syndicated series programming on during the midday and late-night is non-compensable. *See id.* Dr. Fairley's method, however, would assume that a cable operator valued such midday and late-night programming equally with

the WGN prime-time programming, thus supporting a straight-line reduction of the syndicated series category. Given the higher value of prime-time programming, *see* 1990-92 Bortz W.D.T. at 35-36 (D2:2), Dr. Fairley's straight-line adjustment is inappropriate on its face.

111. *Second*, Dr. Fairley's WGN adjustment fails to account for the differential amounts of movie and syndicated series programming that is non-compensable. In both 1998 and 1999, the movies category received a higher value from cable operators than the syndicated series category. *See* JSC Ex. 1 at 3. However, according to PTV Exhibits 12-X and 13-X, only one of the four movies shown by WGN – a late night feature – would fall into the non-compensable category. *Compare* PTV Ex. 12-X *with* PTV Ex. 13-X. Even though cable operators might place little or no value on late-feature movie programming when assigning value to distant signal movies, Dr. Fairley would still make a straight-line reduction of 50+% to the movies category (assuming that WGN was the only signal carried).

112. *Third*, Dr. Fairley made no adjustment to the devotional programming category. *See* Tr. 10655 (Fairley). Again, however, a review of PTV Exhibits 12-X and 13-X reveal the imprecision of Dr. Fairley's WGN adjustment. His "assumption" that all the non-compensable programming was in the two Program Suppliers' categories is incorrect; the Monday through Friday, 5 a.m. to 7 a.m. period on the national WGN schedule shows a number of programs not on the local WGN schedule and that are identified as Devotional programs in Dr. Fratrik's testimony. *Compare* PTV Ex. 12-X *with* PTV Ex. 13-X *and* NAB Ex. 10 at Appendix 3. Given this two-hour "block" of devotional programming each weekday morning, it is clear that a substantial portion of the

non-compensable programming on WGN falls in the devotional category, not the movies and syndicated series categories. Accordingly, Dr. Fairley's WGN adjustment should not be accepted because it wrongly attributes the entirety of non-compensable programming to the syndicated series and movies category.

7. **Category Definitions**

113. As discussed in Mr. Trautman's testimony, when the cable operators survey was first introduced into the distribution proceedings, concerns were expressed regarding the wording of the descriptions of the various programming types. *See* JSC Ex. 1 at 34. Accordingly, the category definitions have been refined and perfected over the years to convey the Phase I category being represented more precisely and concisely. *See id.* Indeed, in response to the CRT's desire for "enhanced programming definitions," in the context of the 1989 Proceeding, Bortz Media revised the definitions based upon the category definition employed by the CRT itself in making its distribution determinations. *See id.* at 35. As a result of these improvements, the 1990-92 CARP made no reference to any concern with the category definitions used in the 1992 Bortz survey, despite criticism of the category definitions by one of the Program Suppliers' witnesses. *See* 1990-92 CARP Report at 56-57.

114. Despite these refinements, the NAB raised the issue of the propriety of the category definitions during cross-examination of Mr. Trautman and Mr. Egan. In response to the questions about whether particular shows such as magazine shows or coaches shows would be placed in the "News and Public Affairs" category, Mr. Trautman acknowledged that within all of the categories there is an amount of programming "on the fringes" that a respondent may place in a wrong category, but testified that such fringe programming is unlikely to account for substantial value. Tr. 323 (Trautman). However,

Bortz Media is aware of no instances in any of its surveys where respondents expressed confusion regarding the programming categories. *See* JSC Ex. 1 at 34. Mr. Trautman stated that cable operators respond based on their "dominant impression" of the programming that was on the distant signals being carried. *See id.* at 326-27 (Trautman). He testified that, consistent with how cable operators act in the marketplace, survey respondents are unlikely to allocate substantial value on a program by program basis:

> I think that our respondents are responding to the survey in the same way that they look at programming networks when they make decisions about carriage, in the sense that they are not thinking -- there may be certain very high value programs that they think of right off the bat in terms of their value in relation to a particular distance signal.
>
> But they are not thinking about each and every program that is aired on that signal. They are thinking about the general categories of program.

Tr. 324-25 (Trautman). Mr. Trautman's testimony in this regard was consistent with the testimony of Paul Bortz in the 1990-92 Proceeding. *See* 1990-92 Bortz W.D.T. at 21 (D2:2).

115. The NAB's attempt to raise the issue of the appropriateness of the category definitions is curious in light of the NAB's strong support of the definitions in prior proceedings. Indeed, NAB proffered a witness in the 1989 and 1990-92 Proceedings, Dr. Ducey, that defended the category definitions in the Bortz survey and the concept that cable operators use a "dominant impression" to value categories. As Mr. Ducey testified in the 1989 Proceeding, "News and Public Affairs programming is, I would think, understood as a dominant impression that's understood well enough by cable operators [to include other station produced programs]." 1989 Tr. 2492 (Ducey) (D6:1). He testified that the Bortz survey provides the best estimate of what station produced programming

should get as an award, *id.* at 2494, and that he was comfortable with the scope of the definition of the "News and Public Affairs" category, *id.* at 2492. Similarly, in the 1990-92 Proceeding, Dr. Ducey testified that the category definitions of the various programming types were "appropriately identified for measurement," *see* 1990-92 Tr. 2092 (Ducey) (D6:9), and there would be a "large overlap" between the CRT's definition of the program types and the category definitions used in the Bortz survey, *see* id. at 2095.

116. Moreover, to the extent that "other" kinds of programming fall within the NAB category, NAB has not attempted to quantify the amount of *value* such programming would add to the News and Public Affairs category in the Bortz survey. When the NAB presented its own constant sum cable operator survey in the 1983 Proceeding, the NAB category was described as "new and other programs produced by commercial stations" and was defined as including "children's programs, public affairs programs and talk shows hosted by the station's own personalities." 1983 CRT Determination, 51 Fed. Reg. at 12799. Despite the lengthier program definitions, the results of the NAB constant sum survey for the NAB category had overlapping confidence intervals with the 1983 Bortz survey. *Compare* 1983 CRT Determination, 51 Fed. Reg. at 12798, 12796 (NAB and Bortz survey cable operator survey results and confidence intervals).

117. The record shows that the "News and Public Affairs" category in the Bortz survey encompasses NAB programming extremely well. While Dr. Ducey makes anecdotal references to the "children's programming" and "post-game shows"[31] other

[31] NAB's claim that pre-game and post-game shows add value to its claim also may be subject to some dispute. If a pregame or postgame telecast is part of the game telecast and not a distinct copyrighted program, it would fall within the JSC claim. *See* 1978 CRT Determination, 45 Fed. Reg. at 63035.

types of programming within the NAB category, NAB makes no effort to quantify the amount or value of such programming. Dr. Ducey himself concedes that station produced news represents the "great majority" of NAB programming. *See* Ducey W.D.T. at 13. The record supports Dr. Ducey's concession; an analysis of the data presented by Dr. Fratrik applying the same TV Data categories he used in his study, *see* JSC Ex. 10-X, Tr. 2158-59 (Fratrik), showed that, in 1998 and 1999, approximately 95% of the NAB programming on WGN and WPIX – the two most widely carried distant signals - fell within the "News" and "Public Affairs" categories.[32]

8. **Canadian Criticisms**

118. A criticism raised by the Canadian Claimants in this proceeding, as in prior proceedings, is that the Bortz survey does not have a large enough sample of cable operators that carry Canadian signals to make precise estimates of the value of Canadian programming. *See* Calfee W.R.T. at 4. Bortz Media's report in this proceeding concedes as much, stating that "the survey methodology is not designed to develop estimates with small relative error rates for programming carried by fewer than four percent of systems and that (when measured across all systems) accounts for only fractions of a percentage point of value." JSC Ex. 1 at 42. Indeed, the Canadian category was only added after the 1983 Bortz survey was criticized for not attempting to value Canadian distant signals. *See* Trautman W.R.T. at 8. As Mr. Trautman testified, the difficulty in measuring the marketplace value of Canadian programming is reflected in the wide confidence intervals

[32] Indeed, JSC Ex. 10-X shows that the percentage of NAB programming categorized as "News" and "Public Affairs" programming on WGN and WPIX actually increased from 1992 to 1998-99. *See id.*

for the Bortz survey estimates for the programming on Canadian signals. *See* Tr. 548-49 (Trautman).

119. Notwithstanding the difficulty in measuring the relative marketplace value of Canadian programming, the Bortz survey's results for just a handful of systems have shown fidelity to the results produced by much larger samples. As Dr. Ringold testified, in the year 1992, her survey of all cable operators that carried Canadian signals included a "Bortz-type" question asking the respondent to assign relative marketplace values for all of the distant signal programming the cable system carried. *See* Tr. 5692 (Ringold). The results of Dr. Ringold's "Bortz-type" question "essentially showed the same value" as the values shown in the Bortz survey. *See* Tr. 5695 (Ringold). To Dr. Ringold, the similarity in the results demonstrated the reliability of the Canadian survey. *See id.* Conversely, the similar results obtained by Dr. Ringold allows greater confidence in the Bortz survey allocation for Canadian signals. *See* Trautman W.R.T. at 9.

G. **Results of Bortz Survey**

120. The following table shows the average results of the Bortz surveys in 1990-92 and in 1998 and 1999, and includes Dr. Fairley's unweighted adjustments for the 1990-92 period as well as the range of results created by his three Methods in 1998 and 1999.

Bortz Survey Results 1990-92, 1998 & 1999
Original and w/ Dr. Fairley's Adjustments

Category	1990-92 Average	1990-92 Avg. W/ Fairley Adj.	1998 Bortz (Adj.)	1999 Bortz (Adj.)	1998 Fairley Ranges*	1999 Fairley Ranges*
Live Team Sports	37.4	36.2	36.6	38.3	39.0-44.4	40.4-46.5
Movies	27.1	26.2	21.3	21.3	7.2-14.9	10.7-15.1
Syndicated Series	15.4	14.9	17.6	15.6	10.5-13.2	8.7-10.8
News & Public Affairs	13.0	12.6	14.4	14.3	16.2-17.9	15.5-23.6
Devotional	3.9	3.8	5.2	5.5	3.5-5.9	2.5-6.8
PBS	2.9	6.0	3.4	3.4	8.8-13.9	7.3-13.9
Canadian	0.3	0.3	1.5	1.6	0.0-3.3	0.0-2.7

*Dr. Fairley uses unweighted Bortz data. Ranges are based on results shown in Tables 10, 12 & 13 of Dr. Fairley's corrected testimony. They reflect the ranges for all adjustments combined for Methods 1, 2, and 3.

Other Quantitative Studies

Other Quantitative Studies

OTHER QUANTITATIVE STUDIES

121. The parties introduced several other quantitative studies that were intended to measure - directly or indirectly - the relative marketplace value of different programming categories:

1. Canadian Survey – The Canadian Claimants offered a constant sum survey of cable operators' valuation of programming categories on Canadian signals;

2. Rosston Regression Analyses – The NAB offered a the testimony of Dr. Gregory Rosston, who performed regression analyses in which the royalty payments made by cable systems were related to the minutes of programming per category on those systems;

3. Nielsen study – The Program Suppliers offered a study of the amount of relative time that People Meter households viewed the different types of distant signal programming;

4. Fratrik time study – The NAB offered a study of the relative amounts of compensable programming time weighted by distant subscribers for the various categories of programming in 1992 and 1998-99; and

5. Johnson subscriber instances study – The Public Television Claimants offered Dr. Johnson's study of the number of distant subscribers weighted by the amount of compensable programming time.

122. Each of these quantitative studies are discussed in detail in the following sections.

I. CANADIAN CONSTANT SUM SURVEY OF CABLE OPERATORS

123. The Canadian Claimants also presented their own constant sum survey of cable operators to demonstrate the relative value of the different kinds of programming on Canadian stations carried as distant signals by U.S. cable systems. *See* Canadian Ex. 5-A at 2 (Ringold and Ford Report). The purpose of the Canadian survey is to allocate the royalties that are in the "pool" attributed to the carriage of Canadian signals. *See* Tr. 5556-57 (Ringold). In this regard, the Canadian survey is applied to the amount of fees

generated by the carriage of Canadian signals to determine an overall royalty allocation for the Canadian Claimants. *See* Tr. 5348 (Bennett). The Canadian Claimants also presented the results of a similar constant sum survey in the 1990-92 Proceeding. *See* Tr. 5523 (Ringold).

124. Like the Bortz survey, the Canadian survey employs the constant sum methodology. Dr. Ringold, the sponsor of the survey, stated that she chose the constant sum methodology because:

> It's particularly appropriate to this task. Constant sum scaling has been demonstrated to approximate pretty closely actual valuation decisions that consumers make and by consumers here I don't mean necessarily final consumers such as ourselves, but business to business consumer, any sort of consumer.

Tr. 5583-84 (Ringold). She described the constant sum approach as "timeworn, well-tested, well-understood, well-performing method for this kind of valuation activity." Tr. 5533 (Ringold). Dr. Ringold testified that the decision to employ constant sum methodology was clear:

> Frankly, constant sum is, in my view, the most appropriate and I have long argued that that is the only thing that we need and so I came into the setting after it had been described for me thinking about it this way and sort of sticking to my guns over time. And so I probably didn't consider others once I saw the problem. I knew what the method ought to be.

Tr. 5586 (Ringold).

125. Using the constant sum methodology, the Canadian survey asks cable operators to assign a total value of 100% across seven different categories of programming that is carried on Canadian signals. *See* Canadian Ex. 4-A at 10-11. Thus, for example, a cable operator carrying CBUT as a distant signal is asked to provide the relative value of

the programming broadcast on CBUT. The survey lists seven categories: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian produced news, public affairs, religious and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis and auto racing; (5) Canadian produced series, movies, arts and variety shows, and specials; (6) Canadian produced children's programming; and (7) "other" programming. *See* Canadian Ex. 4-A at Appendix 5 (English-language survey questionnaire). The relative value of the Canadian programming as a whole is derived by summing the second, fourth, fifth and sixth categories. *See* Tr. 5680 (Ringold). The other two categories are assigned to the JSC and Program Suppliers. *See* Canadian Ex. 4-A at 14-15.

126. Furthermore, as is seen in the key constant sum question, the Canadian survey is limited to assigning relative value to programs on particular signals, unlike the Bortz survey, which assigns relative value across all signals. *See* Tr. 5349 (Bennett) ("And your approach differs from the Bortz approach in the sense that what Bortz would do is he would go into this particular cable system, and he would ask them to divide the royalty fund among all of the distant signals programming categories, right? MR. BENNETT: Correct."). The Canadian survey does not address the question of the relative value among signals; instead, the Canadian Claimants rely upon a fee-generated methodology to determine how the royalties should be allocated among signals. *See* Tr. 5556-57 (Ringold). Accordingly, the applicability of the Canadian approach relies upon the acceptance of a fee-generated approach.

127. Using the aforementioned methodologies, the Canadian survey produced the following results in 1998 and 1999:

Canadian Constant Sum Survey Results
1998 & 1999

Category	1998	1999
Live professional and collegiate team sports (excluding CFL games)	29	28
U.S. syndicated series and movies	11	13
Canadian news, public affairs, religious and documentary programs	16	16.2
Canadian-produced series, movies, arts and variety shows and specials	12.5	13.7
Canadian-produced sports programming	22.9	19.7
Canadian-produced children's programming	7.7	8.6
Total Canadian-produced programming	*59.1*	*58.2*

See Canadian Ex. 5-A at 13-15.

128. The report of the Canadian survey differs somewhat from the report submitted in the 1990-92 Proceeding, making it difficult to compare the results directly. As noted by Dr. Ringold, the sixth and seventh categories, "Canadian produced children's programming" and "Other" were added for the purposes of the 1993 and 1994 Canadian surveys. *See* Tr. 5678-79 (Ringold). No corresponding categories thus existed in the 1991 and 1992 surveys. Similarly, in the 1990-92 Proceeding, the Canadians presented the results of a "Bortz-type" question, but did not do so in this proceeding. *See* Tr. 5692-93 (Ringold). In the 1990-92 Proceeding, the Bortz-type question showed an overall value of 8.68% for Canadian programming on the systems that carried Canadian signals, a result

very similar to the values given by cable operators carrying Canadian signals in the Bortz survey. *See* Tr. 5696-97 (Ringold); Trautman W.R.T. at 9.

II. ROSSTON REGRESSION ANALYSIS

129. The NAB presented the results of a multiple regression analysis performed by Dr. Gregory Rosston. This regression analysis was sponsored as a "new econometric study, of a comprehensive scope made possible for the first time" that could form a "substantial economic basis on which to determine the relative value of the Phase I claimants' programs in 1998-99." NAB Prehearing Memorandum at 4. Dr. Ducey suggested that this regression analysis could be used as a "starting point" for allocating royalties, but admitted that adjustments probably needed to be made to it. *See* Tr. 1882 (Ducey).

130. Dr. Rosston's regression analysis attempts to "analyze the relationship between royalties paid by cable operators for the carriage of distant signals and the programming on those distant signals." Rosston W.D.T. at 2. For the purposes of analyzing that relationship, the "programming" he refers to is the quantity of programming minutes by programming category. *See id.* at 7. In this regard, the purpose of Dr. Rosston's model is to explain the amount of additional royalties paid by cable systems can be associated with the different kinds of programming represented in this proceeding. *See id.* at 22; Tr. 2696 (Rosston) (identifying the amount of royalties as the dependent variable his model is attempting to explain). Because the royalties paid are not the result of free-market negotiations, however, *see id.* at 2, the Rosston regression analysis does not inform the Panel of the relative marketplace compensation each claimant would receive absent the compulsory license, *see* Tr. 1879 (Ducey) (stating that the Rosston regression analysis "is

not [a] study of the free market."). Dr. Ducey admitted that the relative shares produced by the Rosston regression analysis might be different in a free marketplace. *See* Tr. 1878-79 (Ducey) ("if the different kind of categories are allowed to compete between each other, with the people buying the programming the shares might be different.").

131. As will be discussed below, regression analyses are not new to these proceedings. As with prior regression analyses, the Rosston regression analysis is subject to some criticisms, both in its methodology and in its fundamental approach. Because the analysis was performed for the years 1998 and 1999 alone, it does not have a long history with which its reliability can be judged. The testimony of several experts indicates the Rosston model is fragile and its results are subject to wide variability. In the end, however, the results of the Rosston regression analysis do not undermine and are roughly consistent with the results of the Bortz surveys.

A. **<u>Use of Regressions in Prior Proceedings</u>**

132. The Rosston regression analysis is only the latest in a series of regression analyses presented in the cable royalty distribution proceedings. Apparently, the type of data regarding royalty amounts and cable system distant signal carriage patterns holds some attraction to econometricians who attempt to model the distant signal universe. None of these regression analyses, however, have been accepted by the CRT or the CARP; each had flaws that prevented their consideration as useful evidence. Moreover, none were subsequently presented in a later proceeding with improvements intended to respond to past criticism.

133. In the 1979 Proceeding, the NAB presented the results of two regression analyses. First, the NAB offered a regression analysis performed by Information and Analysis, Inc. in an attempt to show that the popularity of particular programs was not a

factor in a cable operators' selection of a distant signal for retransmission. *See* 1979 CRT Determination, 47 Fed. Reg. at 9883. Second, the NAB offered a econometric analysis prepared by Wharton Econometrics Forecasting Associates, Inc. that suggested that the selection of distant signals was related to (1) the amount of non-network distant signal time occupied by station-oriented programming, (2) the proximity between cable systems and the distant signals they import, and (3) the respective size of the television market from which the signal is being imported with respect to the television market into which it is being retransmitted. *See id.* The CRT made no reference to these studies in its making its award to the NAB.

134. During the 1979 Proceeding, the JSC also presented their own regression analysis, conducted by Lexecon, Inc. That study was intended to demonstrate the rather limited principle that the "amount of time sports programming is carried by stations has a significantly greater impact on whether that station is carried as a distant signal than does the amount of time it carries of other types of programming." *Id.* at 9882. The study showed that the marginal effect of sports programming on whether or not a station would be carried was 5.9 to 6.6 times greater than that of movies and syndicated programming. *See id.* The CRT, however, found the Lexecon regression analysis to be helpful because of "various technical and conceptual limitations of that study, such as the treatment of the alternative dependent variables." *See id.* at 9893.

135. The 1990-92 Proceeding featured two regression analyses, sponsored by the Program Suppliers and presented by Dr. Stanley Besen and Dr. John Woodbury. The Besen study employed a multiple regression analysis to estimate the relative value to cable operators of each program category carried on distant signals (excluding PTV and

Canadian programming). *See* 1990-92 CARP Report at 67. Dr. Besen performed this analysis by measuring the correlation between changes in compulsory license royalty fees paid by cable systems and changes in viewing hours for each program category carried by those systems. *See id.* Dr. Besen's regression analysis produced a royalty share of 86.3% for Program Suppliers, 7.7% for the JSC and negative shares for the NAB and the Devotional Claimants. *See id.* at 68-69.

136. Dr. Besen's regression analysis was subject to a great deal of criticism. All four expert witnesses – one offered by the JSC, one by PTV, one by the Devotionals and one by the NAB – criticized the Besen regression analysis for "foreordaining" the results of the analysis by utilizing viewing hours as a measure to cable operators. *See id.* at 70. Among other criticisms, NAB's expert witness, Dr. George Schink, suggested that Dr. Besen's study should be disregarded because it omitted critical variables, had multicollinearity issues, and had a low explanatory power of only 30%. *See id.* at 74.[33]

137. In the end, the CARP rejected the use of Dr. Besen's regression analysis in the 1990-92 Proceeding. In particular, the CARP found that the use of Nielsen viewing hours as the measure of program value "inevitably forecasted" the outcome of the Dr. Besen's regression analysis. *See id.* at 75. The CARP also cited the regression analysis' failure to explain 70% of the changes in distant signal programming as a reason to reject it. *See id.* at 76.

---

[33] The explanatory power of a regression analysis is represented by the "r squared" value. *See* Tr. 2776 (Rosston). Thus, for example, an r squared value of .70 would mean that the regression model explained 70% of the variation in the particular data element being studied – the dependent variable. *See id.*

138. Program Suppliers also offered a regression analysis performed by Dr. John Woodbury. The purpose of Dr. Woodbury's regression analysis was to determine the correlation between the Bortz survey respondents' hypothetical budget allocations and the share of programming for the type of distant signals actually carried. *See id.* at 56. In doing so, Dr. Woodbury assumed that the viewing shares or hours of programming for the categories given high allocations by the respondent would correspond to those allocations. *See id.* Dr. Woodbury's regression analysis was criticized by the other claimants on the basis that he presumed that hours of programming or viewing corresponded to value. *See id.* at 62. The CARP did not mention Dr. Woodbury's regression when analyzing the significance of the Bortz survey. *See id.* at 65-66.

B. **Methodology**

1. **Data Collection And Regression Processing**

139. Dr. Rosston's regression analysis is, at essence, built on the amount of minutes of each programming category broadcast on stations retransmitted as distant signals. Dr. Rosston received data from Cable Data Corporation on the royalties paid and the distant signals carried by each Form 3 cable system in the years 1998 and 1999. *See* Rosston W.D.T. at 16. Dr. Rosston was also provided data from Dr. Fratrik's study of the number of minutes of programming of each type on each station that was carried as a distant signal in 1998 or 1999.[34] *See id.* Combining these two databases of information

[34] Dr. Rosston did not perform a regression analysis for the year 1992. *See* Tr. 2944 (Rosston) ("I haven't thought about doing one for 1992"). Accordingly, Dr. Rosston concedes that his study does not show whether there has been a change in the relative marketplace values of distant signal programming from 1992 to 1998-99. *See* Tr. 2840 (Rosston).

created a dataset of information on the number of minutes of each type of programming carried by each cable system. *See id.*

140. Dr. Rosston included more than royalties and programming minutes in the dataset he used for his regression analysis. In order to account for the "large number of factors" which affect the royalties paid by a cable system, Dr. Rosston added certain variables to the dataset to complete his model: (1) the number of subscribers to the cable system in the prior period (the so-called "lagged subscribers" variable); (2) the number of activated channels for the cable system; (3) the average household income of the market in which the cable system was located; (4) the total number of local channels carried; (5) a variable to account for the payment of 3.75% royalties; and (6) a variable to account for the carriage of partially distant signals. *See id.* at 8-11.

141. Dr. Rosston excluded certain cable systems from his analysis. He excluded cable systems that did not carry distant signals. *See id.* at 12-13. He also divided his dataset into two subsets – one with all cable systems with distant signal carriage (the "Greater-Than-Zero" model), and one with all cable systems that carried one or more DSE (the "Greater-Than-Or-Equal-To-One" model). *See id.* at 13.

142. Once the dataset was completed, Dr. Rosston used a computer program to run his regression analyses on the variables. *See* Tr. 2668 (Rosston). He ran his regression analysis separately on the Greater-Than-Zero and Greater-Than-Or-Equal-To-One datasets, "within milliseconds of each other." Tr. 2891-92 (Rosston). The computer program analyzed the dataset and generates the estimated coefficients for the variables. *See id.* For the programming variables, these coefficients "represent the effect of an additional minute of programming in each of the categories on royalties, holding constant

all other minutes and other factors." Rosston W.D.T. at 22. In other words, the coefficent of 1.63 for sports programming indicates that carriage of an additional minute of distant signal sports programming by a cable system would lead to an increase in royalties paid by that system of $1.63. *See id.* By comparison, the coefficient produced for PTV programming showed that an additional minute of PBS programming generated $0.067 in royalties, or approximately 1/25th the amount generated by sports programming. *See id.* at 19. The coefficients produced by the Rosston regression analyses are as follows:

Coefficients in Rosston Regression Analyses

Claimant Group	Greater-Than-Zero Coefficient	Greater-Than-Or-Equal-To-One Coefficient
Program Suppliers	0.152	0.151
Sports	1.631	1.856
Commercial TV	0.146	0.143
Public Broadcasting	0.067	0.066
Devotional	-0.318	-0.311
Canadian	-0.055	-0.056

2. __Analysis And Presentation Of Results Of Regression Analyses__

143. Once the regression analyses were completed, Dr. Rosston checked the results to see whether they made sense based on the expectations he had about the cable industry. *See* Tr. 2649 (Rosston). Dr. Rosston concluded that they did meet his expectations based upon the fact that, among other things, the fact that his regression analysis showed that "[s]ports is substantially more valuable than the other stuff, which when I come to sort of checking the reasonableness of results makes some sense." Tr. 2648 (Rosston). Moreover, Dr. Rosston thought that the similarity between the results of his regression analysis and the Bortz survey were "very good," in light of the completely different methods used by the two studies. *See* Tr. 2920 (Rosston).

144. Subsequently, in order to "test" his model for robustness, Dr. Rosston also completed a "fixed effects" and "random effects" regression analysis. *See* Rosston W.D.T. at 12-13. Dr. Rosston described these regression analyses as "checks" on his model. *See id.* at 12. However, these "robustness" tests failed to produce the same level of statistical significance as his original models. The random effects regression failed to produce statistically significant coefficients for the PTV and Canadian categories. *See* Rosston W.D.T. at 21. The fixed effects regression failed to produce statistically significant coefficients for half of the programming categories. *See id.* at 22.

145. Dr. Rosston used the coefficients produced by the Greater-Than-Zero regression analysis to determine the ultimate share of royalties for each programming category. He did this by multiplying the coefficient for each category by the number of programming minutes for that category in his study[35] to come up with a "total value" for the category. *See* Tr. 2655 (Rosston). He then divided that number by the total for all programming categories to come up with a percentage share of the total. *See id.*

146. Dr. Rosston decided not to use the results of the Greater-Than-Or-Equal-To-One regression in presenting his testimony. *See* Tr. 2854-55 (Rosston). The Greater-Than-Or-Equal-To-One regression produced a higher relative share for sports programming and lower relative shares for the Commercial TV and PTV categories. *See*

[35] Dr. Rosston's analysis did not deduct minutes attributable to signals that were carried only as partially distant signals. *See* Tr. 2637-38 (Rosston). Accordingly, while Dr. Fratrik's study reported that PTV's share of all programming minutes was 14.87%, the PTV minutes reported by Dr. Rosston (64,107,541) equaled 20.13% of all the minutes in his study. By the same token, the percentage of sports programming minutes, 3.58% was substantially less than the 4.91% reported by Dr. Fratrik. *Compare* Rosston W.D.T. at 23 *with* NAB Exhibit 10 at 13. The shift in minutes in favor of the PTV category is likely the

Footnote continued on next page

JSC Ex. 14-X. The basis for Dr. Rosston's decision was that his preferred model, the Greater-Than-Zero model allowed him to use more information and allowed him to provide more precise estimates. *See* Tr. 2847 (Rosston). However, Dr. Crandall noted that the marginal information gleaned from the extra observations included in the Greater-Than-Zero model was likely to be small. The Greater-Than-Or-Equal-To-Zero model, however, had virtually the same explanatory power, *see* Tr. 2854 (Rosston), and had more statistically significant coefficients for the variables included in the analysis than the Greater-Than-Zero model, *see* Rosston W.D.T. at 19; Rosston W.D.T. at Appendix C. However, Dr. Rosston admitted that, while his model was intended to measure "the actual marketplace behavior of the cable systems," Tr. 2646 (Rosston), cable systems carrying fewer than one DSE would face no additional royalty expense for carrying additional signals, *see* Tr. 2847-49 (Rosston). Because these systems face a zero marginal royalty rate for acquiring distant signal programming, Dr. Crandall contended that this model should be afforded equal weight. *See* Crandall W.R.T. at 6-7. The results of the Greater-Than-Or-Equal-To-One regression analysis were presented in JSC Exhibit 14-X.

C. **<u>Criticisms</u>**

147. As with the other regression analyses presented in the past, the Rosston regression analysis was subject to considerable criticism. Dr. Robert Crandall, a JSC witness, Dr. John Calfee, a witness for the Canadian Claimants, Dr. Martin Frankel and Dr. Arthur Gruen, witnesses for the Program Suppliers, all provided rebuttal testimony that criticized the Rosston regression analysis. The criticisms of the Rosston regression

---

Footnote continued from previous page
result of the fact that approximately 33% of all distant instances of carriage of PTV signals are partially distant instances. *See* Hazlett W.D.T. at Appendix E.

analysis focused on several issues with the Rosston regression analysis: (1) the variability of its results; (2) its failure to account for the "seller's side;" and (3) its lack of explanatory power.

1. <u>Variability Of Results Of Regression Model</u>

148. The testimony of Drs. Crandall and Frankel demonstrated the variability of the results of the Rosston regression model. This variability was demonstrated by the analysis presented by Dr. Crandall. In his rebuttal testimony, Dr. Crandall divided the Rosston regression dataset into separate datasets for 1998 and 1999 – as suggested by a question from the Panel – and performed the same regression analysis for the years 1998 and 1999 separately. The results of that analysis revealed very different shares in each year; whereas the "Sports" share in 1998 was 30.34% in 1998, it was 36.51% in 1999. *See* Crandall W.R.T. at 4. The "Commercial TV" share was 13.35% in 1998, but possibly 0% in 1999. *See id.* at 5. This variability occurred even though Dr. Rosston testified that he did not recall seeing a "big difference" in the data between 1998 and 1999. *See* Tr. 2657 (Rosston).

149. Dr. Frankel also demonstrated the variability of the Rosston regression analysis in his rebuttal testimony. He concluded that "when non-program minute[] variables are altered, the coefficients change substantially." Frankel W.R.T. at 12. In support of his conclusion, Dr. Frankel noted that the exclusion of certain variable unrelated to programming minutes cause large changes in the royalty shares produced by the analysis. For example, Dr. Frankel testified that statisticians often remove a variable when it has a high correlation with the variable being studied – in this case, royalties. Because of the high correlation between subscribers and royalties, Dr. Frankel removed the "lagged subscribers" variable from the model. *See* Frankel W.R.T. at 13. The results

of that regression produce a royalty share of 60.95% for Sports and 38.56% for Program Suppliers. *See* Frankel W.R.T. at Table 1. Similarly, when Dr. Frankel added several variables that showed moderate correlation with royalties, the regression analysis produced a 100% share for Sports. *See* Frankel W.R.T at 13 and Table 1.

150. The testimony of Drs. Frankel and Crandall showed that the Rosston analysis had extreme variation in the face of modest changes in the variables included in Dr. Rosston's dataset. Indeed, Dr. Rosston's own regression analysis shows wide confidence intervals; using the 95% confidence intervals to calculate each claimant's share yields the following results (holding all other coefficients equal):

Confidence Intervals For Rosston Greater-Than-Zero Regression

Programming Category	Minimum Share (95% Confidence)	Maximum Share (95% Confidence)
Program Suppliers	27.62%	53.83%
Sports	24.77%	39.04%
Commercial TV	2.95%	17.67%
Public Broadcasting	4.38%	10.47%
Devotional Programming	0.00%	0.00%
Canadian Programming	0.00%	0.67%

See Rosston W.D.T. at 19, 23 (identifying coefficients and programming minute totals); Tr. 2869-2872 (Rosston) (explaining methodology for calculating extremes of confidence intervals).[36] By contrast, the same 95% confidence intervals of the Bortz survey are much

[36] With the exception of the Devotional category, the ranges produced by the Rosston regression analysis overlap with the confidence intervals of the Bortz survey. *See* JSC Ex. 1 at 55-56. In the case of the PTV category, this overlap would occur if the adjustment for PTV-only systems discussed in Mr. Trautman's rebuttal testimony were added to the PTV estimate.

narrower, ranging from 0.2% for the Canadian category in 1999 to 3.0% for the live sports category for 1999. *See* JSC Ex. 1 at 54-55. The wide variability of the results of the Rosston regression analysis compared to the Bortz survey demonstrate the hazards of employing that analysis as a "starting point" for the allocation of royalties versus the time-tested and more precise results produced by the Bortz survey.[37]

2. **<u>Failure To Account For The Seller's Side</u>**

151. The Rosston regression analysis is subject to the same criticism as the Bortz survey in that it fails to account for the "seller's side." The royalties that Dr. Rosston describe as his "dependent variable" are not the product of free market negotiations, his attempt to analyze those royalties in terms of programming minutes does not yield results that simulate how sellers would act in the marketplace. *See* Crandall W.R.T. at 9. Indeed, Dr. Ducey conceded that the Rosston study does not "model a free market seller's perspective." Tr. 1899 (Ducey); *see also* Tr. 1912 (Ducey) (noting that the regression analysis does not take into account a potential seller's willingness to underprice their programming). As such, while the Rosston regression analysis may produce an 10.9% implied share of royalties for the NAB, the broadcasters themselves might accept lower royalties – as evidenced by the NAB's support for rate regulation following the 1992 Cable Act – in return for benefits unrelated to distant signal carriage. *See* Crandall W.R.T. at 10. Thus, to the extent that the "seller's side" is relevant in analyzing the Bortz survey, that consideration should also impact the Rosston regression analysis.

---

[37] Indeed, the relatively smaller confidence intervals produced by the "Greater-Than-Zero-DSE" model when compared to the "Greater-Than-Or-Equal-To-One-DSE" model was one of the reasons that Dr. Rosston presented the former rather than the latter regression analysis. *See* Tr. 2847 (Rosston) ("I got more precise estimates with the DSE greater than zero than the DSE greater than one.").

3. Lack Of Explanatory Power

152. Drs. Calfee and Gruen strongly criticized the Rosston regression analysis for its lack of explanatory power. Both Dr. Calfee and Dr. Gruen noted that the programming minutes variables in the Rosston regression analysis explain approximately 2% of the variation in royalties across systems. *See* Gruen W.R.T. at 5; Calfee W.R.T. at 6. The 2% level cited by Drs. Calfee and Gruen is far below the 30% level the CARP criticized in the 1990-92 Proceeding. *See* 1990-92 CARP Report at 76. As stated by Dr. Gruen, in effect, Dr. Rosston's model "is telling us only that the variation in royalties principally results from the variation in subscribers." Gruen W.R.T. at 5. Accordingly, the differences in the relative amount of programming *time* carried by cable systems – what Dr. Rosston's analysis ultimately studies – is not effective in explaining the relative marketplace *value* of that programming. This conclusion, of course, is consistent with the CRT's conclusion that time-based considerations have little relevance in demonstrating the relative marketplace value of programming. *See, e.g.*, 1978 CRT Determination, 45 Fed. Reg. at 63037; 1980 CRT Determination, 48 Fed. Reg. 9563.

D. Results

153. As stated above, the Rosston regression analysis generated coefficients for each programming category. These coefficients were then applied to the raw total of minutes of programming in that category carried by the cable systems in his dataset. While Dr. Rosston presented his regression analysis as a combined analysis for the years 1998 and 1999, he could not guarantee the Panel that there would not be significant differences between the two years. *See* Tr. 2657 (Rosston). However, Dr. Crandall performed separate regressions in his rebuttal testimony to demonstrate the effect of dividing his regression into two years. *See* Crandall W.R.T. at 4. In addition, Dr.

Rosston's Greater-Than-Or-Equal-To-One model generated results that were presented in JSC Exhibit 14-X, and Dr. Crandall performed separate regressions for 1998 and 1999 on that model as well.

154. Dr. Rosston's regression analysis methodology produced the following results, presented by both he (either directly or in an appendix) and Dr. Crandall:

Rosston Regression Analysis Results						
Programming Category	Rosston >0 DSE (1998-99)	Rosston >0 DSE (1998 Only)	Rosston >0 DSE (1999 Only)	Rosston 1+ DSE (1998-99)	Rosston 1+ DSE (1998 Only)	Rosston 1+ DSE (1999 Only)
Program Suppliers	48.71%	47.53%	48.10%	47.07%	45.51%	46.60%
Sports	32.54%	30.34%	36.51%	36.87%	35.20%	40.54%
Commercial TV	10.90%	13.33%	8.57%	9.98%	12.52%	7.51%
Public Broadcasting	7.52%	8.68%	6.26%	5.73%	6.64%	4.79%
Devotional	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Canadian	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Low Power	0.22%	0.00%	0.44%	0.22%	0.00%	0.43%
Mexican	0.12%	0.12%	0.13%	0.13%	0.13%	0.13%

III. NIELSEN STUDIES OF VIEWING MINUTES

155. The Program Suppliers once again sponsored a special Nielsen study (the "Nielsen study"). The Nielsen study is intended to measure the amount of time People Meter households spend viewing distant signal programming. *See* Lindstrom W.D.T. at 4-6. The results of the Nielsen study are then used by Dr. Gruen to recommend royalty allocations for the various program categories. *See* Gruen W.D.T. at 37-40. Dr. Gruen does not advocate the use of the Nielsen study of distant viewing on its own to allocate royalties, but rather recommends that the Panel take some adjustments for viewer avidity into account in its determination. *See* Tr. 7589-91 (Gruen).

A. Use of Viewing Studies in Past Proceedings

156. The Program Suppliers (previously identified as the MPAA) began offering the Nielsen study of distant signal viewing in the 1979 Proceeding. *See* 1979 CRT Determination, 47 Fed. Reg. at 9880. In that proceeding, the CRT found the Nielsen study to be the "single most important piece of evidence in [the] record." 1979 CRT Determination, 47 Fed. Reg. at 9892. The CRT used the Nielsen study of distant signal viewing as a "starting point" for the application of the CRT's distribution criteria to the record evidence. *See id.* Even in that proceeding, however, the CRT recognized that "cable operators are interested in selling subscriptions and that viewership is of limited relevance to cable operators." *Id.*

157. Over the years, however, the CRT placed less reliance on the Nielsen study. In the 1983 Proceeding, the CRT overcame its concerns regarding the survey evidence presented by the JSC, *see* 1983 CRT Determination, 51 Fed. Reg. 12811, and gave some weight to the Bortz survey, *see id.* at 12810. The 1989 Proceeding "was primarily marked by arguments as to which the best indicator of the market value of the Phase I program categories: the Nielsen study of distant signal viewing, or the Bortz survey of cable operators' budget preferences." 1989 CRT Determination, 57 Fed. Reg. at 15288. In that proceeding, the CRT gave new weight to the Bortz survey, holding that "[w]here corroborating evidence existed to sustain that a program category had an intense viewership or commanded valuable license fees, then the results of the Bortz survey were given substantial weight." 1989 CRT Determination, 57 Fed. Reg. at 15301. Based on the higher credit given to the Bortz survey, the NAB and the JSC awards were increased. *See* 1989 CRT Determination, 57 Fed. Reg. 15302-03.

158. Again, in the 1990-92 Proceeding, the two main pieces of evidence put forth by the parties were the Nielsen study and the Bortz survey. *See* 1990-92 CARP Report at 26. For the first time, the Bortz survey was given greater weight than the Nielsen study; while the CARP stated that it could not "quantify the Nielsen statistics as evidence of market value," *id.* at 44, it concluded that the Bortz survey was "focused more directly than any other evidence to the issue presented: relative market value," *id.* at 65.

B. **Methodology**

159. The purpose of the Nielsen study is to show the amount of viewing of distant signal programming in households and by persons that are in the Nielsen People Meter sample. To do so, Nielsen obtains a list of all the stations carried as distant signals in a particular year, listed by the number of subscribers who receive those stations as distant signals. *See* Lindstrom W.D.T. at 4. Nielsen then pick a list of these stations to include in the Nielsen study on a stratified basis; the top 50 stations are selected with certainty and 130 of the remaining stations are selected on a random basis. *See* Lindstrom W.D.T. at 4-5; PS Exs. 10, 11 (station lists). Once the stations are selected, Nielsen provides the list of selected stations to Ms. Kessler of MPAA, who determines the counties in which the viewing of those stations would be considered "distant." *See* Kessler W.D.T. at 22-23. Ms. Kessler then provides the list of "local" and "distant" counties for each station to Nielsen. *See id.*

160. Nielsen takes the county information from Ms. Kessler and then compares that information to its database of all viewing by households and persons in the Nielsen People Meter sample. Nielsen excludes all viewing minutes from non-cable People Meter households (such as those who receive the stations via their rooftop antennas or through subscriptions to satellite television services) and from People Meter households

considered "local" for that station according to Ms. Kessler's analysis. *See id.* Nielsen examines the programming schedule for each station and systematically classified the programming into the various Phase I categories (Syndicated Series, Specials and Movies, Sports, Local Television, Non-Commercial and Devotional) based upon an "agreed upon set of rules." *See* Lindstrom W.D.T. at 5. What remains is intended to represent the viewing of the programming, by category, on the selected stations by People Meter households that receive those stations as distant signals. *See id.* at 5-6.

161. There were some changes in the presentation of the 1998-99 Nielsen study as compared to the 1990-92 study. The 1998-99 Nielsen study was the first to include viewing data by demographics and quintiles. *See* Tr. 7234 (Lindstrom); Tr. 7241 (Lindstrom); Tr. 7330-32 (Lindstrom). In addition, Nielsen did not present information on the number of unduplicated households with distant signal viewing in 1998-99. *See* Tr. 7331-32 (Lindstrom).

162. It is also important to note that the 1990-92 Nielsen study itself included a significant departure from prior methodology. The studies presented by the MPAA in prior proceedings were studies based on diaries completed by households in the Nielsen sample, not data collected electronically from People Meters. *See* Tr. 7250-51 (Lindstrom). Because the diary studies are based on different methodologies, they are not directly comparable to the Nielsen studies introduced in the 1990-92 or the 1998-99 Proceedings. *See* Tr. 7251 (Lindstrom). In addition, the 1990-92 and 1998-99 Nielsen studies have a different sample selection procedure than earlier studies. Before the 1990-92 Proceeding, the Nielsen study was based only those stations that reached a certain minimum number of distant subscribers, and there were no randomly selected stations.

See 1989 CRT Determination, 57 Fed. Reg. at 15289 (noting study was limited to commercial stations with 80,000 distant subscribers and noncommercial stations with 100,000 distant subscribers).

C. **Criticisms**

163. Although there were no specific criticisms of the methodology of the Nielsen study in this proceeding, once again parties raised questions about the relevance of the Nielsen study. As Paul Lindstrom testified, the Nielsen study is intended to measure viewing, and Nielsen does not present the Nielsen study as a measure of relative marketplace value. *See* Tr. 7271 (Lindstrom); Tr. 7286 (Lindstrom).

164. In the 1990-92 Proceeding, the CARP took note of a number of criticisms of the Nielsen study, such as the non-response rate and the miscategorization of programs, but was "unpersuaded" by those criticisms in light of the failure of the witnesses offering those criticisms to articulate the effect of the criticisms. *See* 1990-92 CARP Report at 42-43. As to the relevance of the Nielsen study, the CARP noted that in that proceeding, as in this proceeding, the Program Suppliers acknowledged that the Nielsen study measures tuning rather than value, and that interpretation of the results should be left to the other witnesses. *See id.* at 43. In the end, the CARP held that it could not "quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant when weighed with all other factors." *See id.* at 44.

165. Similar testimony was offered concerning the Nielsen study in this proceeding from a variety of witnesses. Dr. Rosston testified that viewing is not necessarily indicative of value in that a subscriber may place value upon having programming available, but not "consume" that much of the programming – akin to a consumer's desire for car insurance. *See* Tr. 2671-72 (Rosston). Mr. Trautman testified

that cable networks that have a great deal of viewing may have little value in the marketplace, while the opposite is also true - cable networks with relatively little viewing can have a great deal of value in the marketplace. *See* Tr. 537 (Trautman); *see also* Tr. 765 (Crandall). Mr. Egan, who worked in the cable industry for 20 years, indicated that cable operators have little interest in Nielsen data when making programming decisions. *See* Tr. 1312-15 (Egan)

166. As in the 1990-92 Proceeding[38], one of the fiercest criticisms of the relevance of the Nielsen study was offered by PTV. One of PTV's witnesses, John Fuller, stated unequivocally in his direct written testimony that the "Nielsen study should not be given significant weight in this case." Fuller W.D.T. at 20. Mr. Fuller roundly cricitized the Nielsen study for not "addressing the criteria of relevance to the Panel" and that it only reveals "what viewers eventually tuned in to but nothing about why they chose those programs or whether those programs motivated them to subscribe or remain subscribed to cable." *Id.* at 20-21. Mr. Fuller further stated that "the value of programming to cable operators cannot be measured by the number of hours of programming, or by the viewing levels achieved by that programming." *Id.* at 22. He concluded that "Nielsen viewership does not tell us what value a cable operator places on particular programming." *Id.* at 25.

167. The Program Suppliers have put forth testimony that the results of the Nielsen study do not, on their own, reflect the relative market values of the different programming categories. *See* Tr. 7590 (Gruen). Dr. Gruen testified that he believed that:

> [T]he popularity of the various programming categories as measured by the avidity or interest and loyalty of viewers should play a more important role than program volume and

[38] *See* 1990-92 CARP Report at 37 (stating Dr. Fairley's criticisms of the Nielsen study).

> a more important role than is reflected by aggregate viewing share minutes.

Gruen W.D.T. at 38. Dr. Gruen testified that the percentage of viewing minutes that a particular cable network might generate could be different from the percentage of license fees that it can command in marketplace negotiations. *See* Tr. 7630 (Gruen). He similarly testified that the percentage of viewing minutes that a cable network might generate could be different from the percentage of dollars they expend in the marketplace to purchase programming. *See* Tr. 7638 (Gruen). Accordingly, Dr. Gruen performed what he called "avidity adjustments" to increase the value of viewing against the volume of that programming measured by the Nielsen study. *See id.* at 38-39.

D. **Results**

168. The Program Suppliers presented the Nielsen study of distant signal viewing in two ways: first, the actual viewing minutes and relative shares of viewing were disclosed in the testimony of Paul Lindstrom; second, Dr. Gruen performed an adjustment of those results to account for what he described as viewer avidity. Those presentations will be discussed separately.

1. **Nielsen Viewing Study**

169. As in the 1990-92 Proceeding, Mr. Lindstrom presented the results of the 1998 and 1999 Nielsen studies. The following table shows the results of both the 1998 and 1999 studies of household distant signal viewing (as opposed to viewing by persons) disclosed by Mr. Lindstrom and compares those results to the 1991-92 studies of household distant signal viewing:

Full Year Viewing
1992, 1998, 1999

Category	1991 HH Viewing[39]	1992 HH Viewing	1998 HH Viewing	1998 2+ Viewing	1999 HH Viewing	1999 2+ Viewing
Syndicated Series, Specials, & Movies	83.7%	81.1%	58.9%	59.1%	61.0%	59.5%
Local	6.5%	7.9%	14.4%	14.4%	15.0%	14.8%
Sports	7.1%	6.4%	9.0%	9.4%	7.9%	8.1%
Non-Commercial	2.0%	3.8%	16.9%	16.5%	15.1%	16.8%
Devotional	0.4%	0.6%	0.7%	0.5%	0.9%	0.8%
Other	0.2%	0.2%	0.1%	0.1%	0.1%	0.1%

Compare PS Exs. 4 & 6 *with* 1990-92 Lindstrom W.D.T. at 10-14.[40] As noted above, Program Suppliers presented only household viewing data in the 1990-92 Proceeding, rather than demographic data, making only the full-year household viewing results in 1998-99 comparable to the 1990-92 viewing studies. Furthermore, although Mr. Lindstrom provided data concerning the sweeps period, he did so as an "historical artifact for trending purposes." Tr. 7227 (Lindstrom). The use of sweeps periods was the subject of historical criticism of the Nielsen study. *See, e.g.,* 1989 CRT Determination, 57 Fed. Reg. at 15299.

170. The results of the Nielsen study showed that the share of viewing attributable to the "Sports" category increased from an average of 6.5% in 1991-92 to 9.0% in 1998 and 7.5% in 1999. On a relative basis, this represented an increase of 36% from 1990-92 to 1998 and 19% from 1990-92 to 1999.

---

[39] As the CARP noted in its report, the 1991 Nielsen data for PTV were substantially incomplete, *see* 1990-92 CARP Report at 121, thus making the 1991 Nielsen results for the PTV difficult to compare with other years.

[40] Mr. Lindstrom's 1990-92 testimony was designated into the record by the Program Suppliers in their June 16 designations. The "Average" for 1990-92 is calculated by totaling the number of minutes for each category for all three years and dividing that by the total number of viewing minutes for all three years.

2. **Gruen Adjustments**

171. Dr. Gruen presented adjustments to the Nielsen study results based upon his selection of the viewing minutes of the 18-49 demographic as the relevant data and upon his calculation of an "avidity factor" to adjust the 18-49 viewing minutes. Dr. Gruen used the viewing minutes of the 18-49 demographic because he believed that it "best represents how programming on distant signals would be valued by cable operators as reflected by their marketplace behavior." Gruen W.DT. at 37.

172. Dr. Gruen adjusted the 18-49 viewing minutes by his avidity factor. Dr. Gruen's avidity factor involved creating a "parity value" against which an adjustment factor can be computed. Dr. Gruen defined the parity value as one viewing minute per quarter hour of programming. He then compared the actual viewing of each programming category to the number of quarter hours studied for that category, i.e., its viewing minutes to quarter hour ratio. He then selected the midpoint between this ratio and the parity value to derive his avidity factor. In practice, this meant that a programming category with a viewing minute to quarter hour ratio of 2 was assigned an avidity factor of 1.5, the midpoint between the ratio and the parity level. *See* Gruen W.D.T. at 38. Dr. Gruen excluded PTV from his analysis, based upon his conclusion that PTV should not receive higher copyright payments than its specific contributions to the royalty pool. *See id.* at 34, 37; Tr. 7578 (Gruen).

173. Using this avidity factor for the various programming categories, Dr. Gruen arrived at the following results:

Gruen Avidity Adjusted Shares

Category	18-49 Demographic Full Year
Syndicated Series, Specials, & Movies	69.0
Sports	21.3
Local	9.3
Devotional	0.4

Gruen W.D.T. at 39.

174. Dr. Gruen's avidity adjustments were the subject of questions from the Panel and criticism by certain parties. The Panel expressed a desire to see the results of Dr. Gruen's avidity adjustment applied to all viewing, meaning the 2+ persons demographic, and including PTV. *See* Order in Docket No. 2001-8 CARP CD 98-99 at Appendix B (June 11, 2003). In the same Order, the Panel asked Dr. Gruen to perform his analysis by applying the viewing-to-time ratios he calculated, and not to adjust them based on his parity value, providing what was termed a "full avidity" adjustment. *See id.* The Panel also requested that Dr. Gruen compute his analysis separately for 1998 and 1999. *See id.*

175. The NAB's cross-examination of Dr. Gruen raised the question of whether the ratios employed by Dr. Gruen, i.e., the ratio of program minutes to quarter hours were inappropriate given that Dr. Gruen was comparing two different time measures. *See* Tr. 7852-59 (Gruen). That line of cross-examination gave rise to what was later referred to as the "Stewart Methodology," by which all quarter hours were multiplied by fifteen to derive a viewing-to-time ratio that was based on a minute-to-minute comparison. *See* Tr. 7858-59 (Gruen). Dr. Gruen suggested, however, that the multiplication of quarter hours by fifteen, as suggested in his cross-examination, would require the re-computation of the

parity level. *See* Tr. 7856 (Gruen). Neither Dr. Gruen in his rebuttal nor any other witness presented such a re-computation of the parity level.

176. Based on the questions raised by the Panel, Dr. Gruen recomputed his avidity adjustments to include PTV, to separate the adjustments for 1998 and 1999, and to provide a calculation of the adjustment including all viewing by 2+ persons. *See* Gruen W.R.T. at 35-46. The following calculation summarizes Dr. Gruen's calculations:

Gruen Avidity Adjustments
Rebuttal Calculations

Category	18-49 Midpoint		18-49 Full Adj.		2+ Midpoint		2+ Full Adj.	
	1998	1999	1998	1999	1998	1999	1998	1999
Syndicated Series, Specials, & Movies	60.3	67.7	53.8	67.6	42.7	47.4	38.4	44.0
Sports	28.8	12.6	40.5	18.0	39.3	32.3	47.1	39.0
Local	6.2	11.4	4.0	10.1	10.2	11.8	9.1	10.9
Non-Commercial	4.4	7.9	1.6	4.2	7.6	8.3	5.3	6.0
Devotional	0.3	0.4	0.1	0.1	0.1	0.2	0.0	0.1

Gruen W.R.T. at 36-46.

177. Dr. Gruen did not, however, provide a calculation based upon household viewing, which was the only comparable measure of viewing in 1992. The following table provides the Gruen avidity adjustments on a household viewing basis for the years 1992, 1998 and 1999 based on the data in Mr. Lindstrom's 1990-92 and 1998-99 testimony:

Avidity Adjustment Applied to Household Viewing
1992, 1998 and 1999

Category	1992 HH Midpoint	1992 HH Full Adj.	1998 HH Midpoint	1998 HH Full Adj.	1999 HH Midpoint	1999 HH Full Adj.
Syndicated Series, Specials, & Movies	71.6	70.9	44.1	39.5	50.1	46.4
Sports	24.4	25.8	36.6	45.2	30.2	37.5
Local	3.3	2.9	10.6	9.4	12.2	11.2
Non-Commercial	0.6	0.4	8.5	5.8	7.3	4.8
Devotional	0.1	0.0	0.2	0.0	0.3	0.2

See PS Exs. 4 & 6; 1990-92 Lindstrom W.D.T. at 10-14.

178. Finally, Dr. Gruen also provided the adjustments pursuant to the "Stewart" methodology:

Avidity Adjustment Using
"Stewart Methodology"

Category	18-49 Midpoint		18-49 Full Adj.		2+ Midpoint		2+ Full Adj.	
	1998	1999	1998	1999	1998	1999	1998	1999
Syndicated Series, Specials, & Movies	69.6	67.9	53.8	67.6	54.9	56.5	38.4	44.0
Sports	12.1	6.2	40.5	18.0	17.1	14.1	47.1	39.0
Local	9.2	12.9	4.0	10.1	13.4	14.1	9.1	10.9
Non-Commercial	8.4	12.3	1.6	4.2	14.2	14.7	5.3	6.0
Devotional	0.7	0.7	0.1	0.1	0.4	0.6	0.0	0.1

Gruen W.D.T. at 36-37. As is clear from the preceding tables, the "Stewart Methodology" does not produce different results from the Dr. Gruen's methodology when it is applied to the full avidity adjustment – presumably because the Stewart Methodology, as predicted by Dr. Gruen, merely proportionately reduces the viewing-to-time ratios for each category. *See* Tr. 7857 (Gruen). Moreover, the "Stewart Methodology" as applied to the midpoint adjustment presumes that the parity value remains one, which Dr. Gruen suggested was incorrect. *See* Tr. 7856 (Gruen).

IV. FRATRIK TIME STUDY

179. The NAB also sponsored a study performed by Dr. Mark Fratrik and BIAfn (the "Fratrik time study") that was intended to "analyze the relative amounts of time represented by various categories of programming aired on distantly carried television signals in 1992 and 1998-99." Fratrik W.D.T. at 2. The Fratrik time study quantified the relative amounts of programming by claimant group on distant signals carried by cable systems, as weighted by the number of subscribers that received each program. *See* NAB Ex. 10 at 13. Another purpose of the Fratrik time study was to provide the raw programming minutes data on a station-by-station basis to Dr. Rosston for use in his regression analysis. *See* Tr. 2058-59 (Fratrik).

180. NAB did not present the Fratrik time study as a basis for allocating royalties. *See* Tr. 1574 (Opening Statement); Tr. 1721 (Ducey). Dr. Fratrik made no attempt to measure the value of the programming in his time study. *See* Tr. 2113 (Fratrik). Indeed, he acknowledged the possibility that some of the programming he was measuring may have had no value to cable operators. *See* Tr. 2116 (Fratrik).

A. Methodology

181. Although Dr. Fratrik dealt with more than two million programs on hundreds of broadcast stations in preparing his time study, the basic methodology of his study was relatively straightforward. He obtained program schedules for each distant signal, classified the programs on the schedule by Phase I category, and then weighted the programs by the number of distant subscribers reached by the distant signal. He then tallied the weighted amount of time by category to arrive at a relative share of the amount of programming minutes.

182. To perform this analysis, Dr. Fratrik first obtained a list of all the broadcast stations that were carried as distant signals by Form 3 cable systems in 1992, 1998 and 1999 from the Cable Data Corporation. *See* NAB Ex. 10 at 2. Dr. Fratrik then obtained program schedule information for each of those stations from TV Data, a supplier of programming information to the media industry. *See id.* The TV Data information supplied to Dr. Fratrik included data elements that identified the date, start time, length, title, and TV Data program category of the program. *See id.* at 4. The TV Data information also included an indication that a program was a network program distributed by ABC, CBS or NBC, or that it was an infomercial. *See id.*

183. Instead of acquiring programming information for each day in 1992, 1998 and 1999, Dr. Fratrik 21 days in each of the semiannual accounting period for those years, or a total of 128 days. *See id.* at 6. Dr. Fratrik employed a sampling procedure by which he ensured that he would select at least 3 of each day of the week during each period, and that he would obtain the equivalent of a week's worth of programming each two months. *See id.* at 6-7. As such, while Dr. Fratrik attempted to suggest his analysis was a "census" of all programming, *see* Tr. 2088 (Fratrik), it in fact covered a little more than 10% of the programming during the three years he studied - 128 out of a possible 1,096 days.

184. Once Dr. Fratrik acquired the TV Data information for the days in his sample, he began to classify the programs into categories intended to represent the Phase I programming claimants. He excluded all programming that TV Data identified as ABC, CBS and NBC network programming. *See* NAB Ex. 10 at 9. Then, using the TV Data programming categories – categories that identify programming as "News" "Public Affairs" or "Team vs. Team Sports" – he sorted the programming into categories. *See id.*

Dr. Fratrik also classified programming into the Devotional category based upon a list of Devotional programs provided to him by the Devotional Claimants themselves. *See id.* at 10. For the Commercial TV category (intended to match NAB's claim in this proceeding), he attempted to verify that all programs placed in that category were shown only on one station, and engaged in a number of fine distinctions to divide programming between the Program Suppliers and Commercial TV categories. *See id.*

185. Dr. Fratrik did have to make certain adjustments to his methodology for the PTV and Canadian categories. For the PTV category, instead of obtaining program schedules, he obtained the length of the broadcast day for each PTV station carried as a distant signal, which was then converted to the number of minutes appropriate for the number of days being studied. *See id.* at 6. For Canadian stations, he obtained a percentage breakdown of the programming on each station into Canadian programming, JSC content, and Program Supplier programming, and applied those percentages to the total number of minutes broadcast by that station on the days being studied. *See id.* at 6; Tr. 2088-89 (Fratrik). The Canadian Claimants provided this information to assist Dr. Fratrik in his analysis. *See* Tr. 2089 (Fratrik).

186. Once he classified the programs on each station into categories, he totaled up the length in minutes of all programs in each category for each station. *See* NAB Ex. 10 at 12. These minutes were then weighted by the percentage of all Form 3 subscribers receiving that station as a distant signal. *See id.* The total weighted number derived from this calculation was then summed by category and presented as the results of his analysis for the particular period. *See id.* at 12-13.

187. Dr. Fratrik's methodology produced the following results:

Results of Fratrik Time Study

Claimant Category	1992	1998-99
Program Suppliers	77.87%	60.38%
Commercial TV	8.79%	13.00%
Public Broadcasting	5.04%	14.87%
Sports	4.75%	4.91%
Devotional	2.55%	2.94%
Canadian	1.00%	3.68%
Mexican	0.01%	0.04%
Low-Power	--	0.18%

NAB Ex. 10 at 13 (Table 3) (corrected).

B. **Relevance**

188. The Fratrik time study is irrelevant to the task before the Panel both in its own right as a measure of relative marketplace value and as an indicator of the *change* in relative marketplace value. Although the NAB expressly disclaims any intention of sponsoring the Fratrik time study as evidence of the former, its claim that the Fratrik time study shows a change in relative marketplace value must be rejected in light of the complete irrelevance of programming time to relative marketplace value in the distant signal marketplace.

1. **Absolute Time Shares**

189. As the NAB concedes, the Fratrik time study is not a measure of relative marketplace value. *See* Tr. 1574 (Opening Statement); Tr. 1721 (Ducey). This concession is consistent with the precedent of the CRT; the CRT repeatedly rejected time-based measures for the reason that "an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market

considerations and produce a distorted value of programming." 1978 CRT Determination, 45 Fed. Reg. at 63037.

190. The irrelevance of the time study to the issue of relative marketplace value was made clear by Dr. Fratrik's testimony. Dr. Fratrik stated that his time study only measured the *availability* of programming on distant signal, not the use of that programming, *see* Tr. 1756 (Fratrik), or its marketplace value, *see* Tr. 2112 (Fratrik). Dr. Fratrik's study treated all minutes of programming on a station as the same, meaning that a minute of a prime time baseball game involving the Chicago White Sox was weighted equally with a minute of an infomercial broadcast at 2 a.m. *See* Tr. 2114 (Fratrik). Dr. Fratrik made no effort to study the value of such blocks of programming to either subscribers or cable operators. *See* Tr. 2113-14 (Fratrik). He further did not study the amount of programming in each category by daypart, even though that information was available to him. *See* Tr. 2119 (Fratrik). As demonstrated by the testimony of Paul Bortz in the 1990-92 Proceeding, the value of programming to broadcasters and advertisers changes dramatically based upon the time it is broadcast. *See* 1990-92 Bortz W.D.T. at 35-36 (D2:2). Similarly, Mr. Green testified that one of the key negotiation points in a syndication agreement is the placement of the program by daypart. *See* Tr. 6725-26 (Green). Dr. Fratrik had no knowledge of whether station-produced programming was more prevalent on less desirable day parts, such as before 9 a.m. and after 11 p.m. *See* Tr. 2120 (Fratrik). Thus, even if the Panel were to consider the marketplace value of a programming category as a function of "quantity times price", Dr. Fratrik's study is unhelpful to such an analysis because it does not account for the fact that the same

quantity of programming *within programming categories* may have radically different prices.

191. Dr. Fratrik's study further does not take into account the fact that cable operators have to retransmit all programming on the stations they carry, regardless of whether each program has value to them. *See* Tr. 2114-15 (Fratrik). Dr. Fratrik acknowledged that a cable operator may not place any value on the programming it carried, *see* Tr. 2115 (Fratrik), and that his study is not useful in determining a cable operator's willingness to pay for the programming they carried or the amounts a copyright owner would demand in negotiations, *see* Tr. 2113 (Fratrik). Mr. Trautman noted that at least one cable operator responding to the Bortz survey allocated 100% to the live professional and collegiate team sports category as an indication that the sports programming on the distant signal(s) carried by that system was the only programming that the cable operator would be willing to pay for in the marketplace. *See* Tr. 491-92 (Trautman). Indeed, NAB's own regression analysis indicated that Devotional programming, while taking up 3.68% of the time on distant signal, had a negative correlation to the royalties paid by cable operators. *Compare* NAB Ex. 10 at 13 *with* Rosston W.D.T. at 23. Dr. Fairley's Method 3 "threshold effect" further suggests that, according to his statistical methodology, that some programming that is carried and would thus be included in Dr. Fratrik's study would not be carried in the absence of the compulsory license. *See* Fairley W.R.T. at 43-44. Accordingly, the Fratrik time study has no relevance to the relative marketplace value of programming.

2. **<u>Changes In Time Shares</u>**

192. The relative changes in the shares of distant signal programming time from 1992 to 1998-99 in the Fratrik time study are also irrelevant to the issue of marketplace

value. As noted by Dr. Ducey himself, "just because there's more programming per se doesn't necessarily make it more valuable." Tr. 8982-83 (Ducey). As such, the increase in the NAB category in the Fratrik time study does not necessarily make the NAB programming more valuable. *See* Tr. 8983 (Ducey) ("I mean we could have the NAB programming, for example, go up from eight percent to say 11 percent or 12 percent, and that wouldn't make it necessarily 40 percent more valuable, now would it? A: Not necessarily, no.").

193. There is a strong basis in the record for discounting the relevance of the changes in the relative shares of distant signal programming time shown in the Fratrik time study. Dr. Ducey testified that an increase in the length of a program does not equate to an increase in that program's value. *See* Tr. 8984-85 (Ducey). Furthermore, as Dr. Gruen testified, "cable operators receive diminishing marginal utility from adding another unit of the same product to what they already have." Gruen W.R.T. at 10. The Fratrik time study did not take into account the possibility of such declining marginal utility. *See* Tr. 2120 (Fratrik). Thus, for example, Dr. Fratrik could not testify as to whether the increase in the NAB category was due to the broadcast of additional newscasts that may add little or no value for cable operators. *See id.* at 2120-21 (Fratrik). Mr. Alexander testified that broadcast stations generally *were* adding additional newscasts to their schedule – mostly for the purpose of scheduling diversity. *See* Tr. 2333 (Alexander).

194. The revised results of Dr. Rosston's regression analysis amply prove the point that a change in relative time shares is meaningless in determining changes in relative market value. When Dr. Rosston revised his regression analysis to account for certain corrections made by Dr. Fratrik, the changes in Dr. Rosston's purported measure

of relative value often went in opposite directions of the changes in relative time measured by Dr. Fratrik. *See* Tr. 2838-2841 (Rosston). Dr. Rosston agreed that changes in the relative amount of time as studied by Dr. Fratrik was not predictive of the changes in relative values he intended to show in his regression analysis. *See* Tr. 2934 (Rosston).

195. Moreover, the numbers presented in the Fratrik time study are too generic to be probative of any change in relative marketplace value. Not only can the value of programs vary by daypart, and by whether they are simply low-cost additions to a program schedule, but they can vary by the type of station broadcasting them. The CRT has traditionally recognized that locally produced programming has little value outside the region from which the station originates. *See* 1989 CRT Determination, 57 Fed. Reg. 15302 ("the Tribunal has in the past credited station-produced programming for having regional appeal, but not beyond the close-in regions."). For this reason, the NAB introduced evidence on the number of instances of carriage of stations within 150 miles of their broadcast towers. *See id.*; Ducey W.D.T. at 13-14. Dr. Fratrik's study did not, however, attempt to divide the NAB category into programming carried on stations generally carried within their region (i.e., non superstations) versus the programming carried on superstations such as WGN. When Dr. Fratrik's data was analyzed, it became apparent that the entirety of the increase in distant signal programming time for the NAB category was attributable to an increase in superstation news and public affairs programming, *see* JSC Ex. 12-X, the very type of programming the CRT found to be of little or no value to cable operators. *See* 1983 CRT Determination, 51 Fed. Reg. 12811.

V. JOHNSON SUBSCRIBER INSTANCES STUDIES

196. Dr. Leland Johnson, PTV's expert economist, presented two studies of distant subscriber instances as a quantification of PTV's relative marketplace value. The first study, presented during his direct testimony, focused on the relative change in PTV's overall share of distant subscriber instances from the year 1992 to the years 1998 and 1999. After the Panel asked whether there was an alternative basis in the record for determining PTV's share, *see* Order in Docket No. 2002-8 CARP CD 98-99 at Appendix A (June 4, 2003), Dr. Johnson then offered a study of PTV's share of distant subscriber instances without reference to changes from year to year.

197. Both of the subscriber instances studies offered by Dr. Johnson suffer from the same infirmity – they attempt to equate relative programming volume with relative programming value. Furthermore, Dr. Johnson's fundamental premise that PTV signals are at a level of "parity" with other signals is contradicted by substantial record evidence, including the Bortz survey (that PTV supported in prior proceedings) and the Rosston regression analyses. Dr. Johnson further ignores the significant impact of the must-carry rules on PTV carriage.

A. Dr. Johnson's Original Distant Subscriber Instance Study

198. Dr. Johnson's original quantitative study was an his attempt to show a relationship between the relative number of "distant subscriber instances" of PTV carriage and the relative marketplace value of PTV distant signal programming.[41] His theory was

---

[41] Distant subscriber instances are calculated by multiply each instance of carriage of a station as a distant signal by a cable system by the number of subscribers receiving that station as a distant signal. Thus, a cable system carrying a station to 30,000 subscribers

Footnote continued on next page

"based heavily on changed circumstances since the last cable proceeding." Johnson W.D.T. at 9. Dr. Johnson's theory was based on the concept that PTV's relative marketplace value could be measured with reference to the relative number of distant subscriber instances of PTV carriage versus all distant subscriber instances.

1. **Methodology**

199. Dr. Johnson surmised that the relationship between the relative marketplace value and relative distant subscriber instances could be determined by measuring the CARP's allocation to PTV in the 1990-92 Proceeding against PTV's relative share of distant subscriber instances in 1992. *See id.* at 14-15. Dr. Johnson theorized that the same relationship could be applied to PTV's relative share of distant subscriber instances in 1998 and 1999 to yield the proper allocation to PTV in this proceeding. *See id.* at 15.

200. Dr. Johnson calculated that, in the 1990-92 Proceeding, the CARP awarded PTV 92.4% of PTV's relative share of distant subscriber instances – the CARP awarded PTV 5.5% when PTV signals accounted for 5.9% of the total number of distant subscriber instances. *See id.* at 13-14. Dr. Johnson felt that 92.4% number represented the CARP's relative valuation for PTV distant subscriber instances "after considering the voluminous record in that proceeding and based on all of the evidence before it." *See id.* at 14. Using the CARP's supposed 92.4% relative valuation as an "anchor," he applied that number to the relative number of PTV distant subscriber instances in 1998 and 1999 to arrive at shares of 10.3% and 10.7%, respectively. *See id.* at 15.

2. **Relevance**

Footnote continued from previous page
as a distant signal generates a total of 30,000 distant subscriber instances for that signal. *See* Johnson W.D.T. at 12.

201. Dr. Johnson's theory cannot be used to determine PTV's royalty allocation. As an initial matter, the CARP in the 1990-92 Proceeding made no mention of allocating royalties to PTV by applying a ratio to its share of distant subscriber instances. *See* 1990-92 CARP Report at 122-24. Indeed, there is nothing to suggest that the CARP considered any evidence of subscriber instances. Accordingly, it would be unfair to impute a motive on the part of the CARP to establish a relationship between distant subscriber instances (or any time measure) and PTV's relative marketplace value. Dr. Johnson acknowledged that because instances of carriage are a measure of programming time, they "tend not to be at the forefront" of the prior determinations. Tr. 3756 (Johnson).

202. Dr. Johnson's change in subscriber instances theory is aslo irrelevant because it is based on a measure of time, not value. Dr. Crandall noted that Dr. Johnson's analysis was "merely an alternative form of the time studies" and that it "does not show changes in value to cable operators." Crandall W.R.T. at 11. Indeed, subscriber instances are essentially the same measure as instances of carriage, a time measure to the CRT held to be of limited value:

> The Tribunal notes that public television's percentage of instances of aggregate full-time distant signal carriage remained approximately 10% in 1980, and while this is evidence of the continuing importance played by public television, the Tribunal does not view time-based considerations as any more than limited value. This is not judged a basis upon which to increase PBS's share.

1980 CRT Determination, 48 Fed. Reg. at 9566 (footnote omitted). For the same reasons discussed above with regard to the Fratrik time study, changes in measures of relative time do not prove changes in relative value.

203. Furthermore, Dr. Johnson's selection of the 1990-92 Proceeding as an "anchor" proved to be selective and biased in favor of PTV. When asked how the CARP

would have applied his theory in the 1990-92 Proceeding, Dr. Johnson acknowledged that, assuming that PTV's share of subscriber instances was 5.81% in 1989 and 5.86% in 1992, based on PTV's award of 4% in the 1989 Proceeding, his methodology would result in an award of 4.1% to PTV in the 1990-92 Proceeding. Tr. 3761-65 (Johnson).[42] Dr. Johnson acknowledged that his "relative valuation" level of 92.4% would have varied greatly over the years. Tr. 3771 (Johnson). Indeed, if the Panel were to use the "relative valuation" produced by the 1978 Proceeding as an "anchor" for this proceeding, Dr. Johnson's methodology would produce a relative value of 5.41% in 1998 and 5.60% in 1999.[43] Dr. Johnson refused to accept that his methodology could be used as he developed it with regard to prior proceedings. *See* Tr. 3772 (Johnson). He further admitted that, notwithstanding the fact that the level of superstation carriage rose dramatically in the 1980's and 1990's, PTV's share of the fund remained relatively constant. *See* Tr. 3786 (Johnson). As such, Dr. Johnson's use of the 1990-92 Proceeding as a selective endpoint for his change in distant subscriber instances clearly biased his results in favor of PTV. Had Dr. Johnson's methodology been employed by the CRT in the 1983 and 1989 Proceedings, PTV would received a much lower share of the royalties.

204. Dr. Johnson's methodology reveals the danger of using what appears to be changes in quantitative measures as evidence of "changed circumstances" without examination of whether that evidence previously supported a finding of changed circumstances. While it may be objectively true that PTV's share of distant subscriber

---

[42] The data on PTV's subscriber instances wer derived from JSC Ex. 29-X.

[43] These numbers are derived from PTV's 5.25% award in 1978, *see* 1978 CRT Determination, 45 Fed. Reg. at 63040, and PTV's 10.68% share of basic distant subscriber instances in 1978, *see* JSC Ex. 29-X.

instances increased from 1992 to 1998, it is also objectively true that PTV's share of distant subscriber instances *decreased* by more than 50% from 1980 to 1983 to 1989. *See* JSC Ex. 29-X. That change, however, was not accompanied by a similar decrease in the PTV's royalty award. *See* 1980 CRT Determination, 48 Fed. Reg. at 9563 (1980 5.25% award); 1983 CRT Determination, 51 Fed. Reg. at 12792 (1983 5.20% award); 1989 CRT Determination, 57 Fed. Reg. at 15303 (1989 4.0% award). Indeed, PTV actively resisted the use of raw instances of carriage data in the 1983 Proceeding, suggesting that the CRT should ignore the rise of superstations in setting its award for PTV. *See* 1983 PTV Proposed Findings at 40. Accordingly, because the reduction of PTV's share of distant subscriber instances was not a reason to reduce PTV's share from 1980 through 1992, the corresponding increase in PTV's share of distant subscriber instances cannot be a reason to *increase* PTV's share from 1992 to 1998. PTV cannot have it both ways.[44]

B. **<u>Dr. Johnson's Adjusted Distant Subscriber Instances Study</u>**

205. In his rebuttal testimony, Dr. Johnson abandoned his reliance upon the changes in PTV's relative share of distant subscriber instances to determine the proper award to make to PTV. Instead, Dr. Johnson argued that distant subscriber instances are a "valuable metric for determining PTV's share based solely on observations for 1998-99 without reliance on changes from earlier periods." Johnson W.R.T. at 2. The foundation

[44] The same is true of NAB's evidence of changes in the relative amount of distant signal programming time. In the 1978 Proceeding, NAB put forward evidence that station-produced programming account for 21% of all distant signal programming in 1978 based upon the weighted mix of distant signals at the time. *See* 1978 CRT Determination, 45 Fed. Reg. at 63030. Despite the NAB's large share of programming time, the NAB's award was set at 3.25%. *See* 1978 CRT Determination, 45 Fed. Reg. at 63038. That award increased to 7.5% by the 1990-92 Proceeding, *see* 1990-92 CARP Report at 143, despite the fact that station-produced programming declined, per Dr. Fratrik's time study, to less than 9% of all distant signal programming, *see* NAB Ex. 10 at 13.

for Dr. Johnson's argument that distant subscriber instances are an indication value was his belief that subscriber instances are a reflection of the "votes" of cable operators, and therefore those "votes" could be weighed against the other "votes" of cable operators to determine PTV's share. *See id.* at 2-3.

1. **Methodology**

206. In his rebuttal testimony, Dr. Johnson did not take PTV's share of distant subscriber instances at face value. Instead, he made certain adjustments to the PTV subscriber instances to account for the amount of compensability of programming on other signals carried by cable operators. *See id.* at 6-7. Dr. Johnson estimated that only 50% of the programming on WGN was compensable, so he reduced the WGN distant subscriber instances by 50%. *See id.* Similarly, based on the testimony of Marcellus Alexander, Dr. Johnson estimated that 50% of the programming on network affiliates was non-compensable network programming, and therefore required a similar reduction in the distant subscriber instances for network affiliates. *See id.* Finally, he calculated that the PTV share should be reduced by 16% to account for the fact that PTV stations generally broadcast about 20 hours per day. *See id.* at 7.[45] Using those adjustments, Dr. Johnson calculated that PTV's adjusted share of distant subscriber instances was 12.8% in 1998 and 13.2% in 1999. *See id.*

207. Having calculated his adjusted PTV share of distant subscriber instances, Dr. Johnson argued why that share should equate to PTV's award in this case. Using

---

[45] Dr. Johnson assumes that PTV stations broadcast 20 hours per day (83% of the 24 hours). However, that assumption is contradicted by the testimony of John Wilson, who stated that PTV stations typically had a broadcast day of 18 hours. *See* Tr. 3183-84 (Wilson). That mistaken assumption alone inflates PTV's share by 10%.

hypothetical examples, Dr. Johnson estimated that if cable operators valued all the distant subscriber instances they carried equally, PTV would be entitled to an award of royalties equal to its shared of distant subscriber instances. *See id.* at 4; Tr. 9196 (Johnson). Dr. Johnson described this value as "parity" of value among distant subscriber instances. *See* Johnson W.R.T. at 4. Dr. Johnson then estimated that even if PTV signals were worth 30% less than their commercial counterparts, such a "discount factor" would still support an award in excess of 10%. *See id.* at 8. Dr. Johnson stated that he believed it was "implausible that there would be such a difference in relative value between the carriage of a PTV signal and a commercial signal." *Id.* at 8.

2. **Relevance**

a. **Internally Inconsistency**

208. Dr. Johnson's new subscriber instances theory provides no better basis for setting the PTV share than his original theory. As an initial matter, Dr. Johnson's theory is internally inconsistent. Dr. Johnson's discounting of WGN and network affiliate subscriber instances for "non-compensability" is inconsistent with his argument that of instances of carriage represent "votes" by cable operators for the signals they carry. *See* Johnson W.D.T. at 9. Dr. Johnson's basis for using the instances of carriage measure in the first place was that it represented a measure of "behavior" separate from the "arbitrary sliding scale schedule of fees." *See id.* His decision to discount this measure of behavior – by reducing WGN's distant subscriber instances by 50% - effectively negates the fact that cable systems are actually delivering WGN to their subscribers. Despite Dr. Johnson's adjustment, 32-33 million subscribers actually received WGN as a distant signal, *see* Johnson W.R.T. at 7, and cable systems paid royalties to bring WGN to them. Indeed, because the DSE rates themselves are based upon the volume of compensable

programming, *see* H.R. Rep. 94-1476 at 90, Dr. Johnson simply replaces the DSE schedule set by Congress with his own arbitrary schedule of the value of importing a distant signal (WGN should count as 50%, Affiliates at 50% and PBS at 83%). He thus commits the same sin against which he preaches.

b. **Time-Based Measure**

209. Regardless of Dr. Johnson's inconsistency, the adjusted distant subscriber instances number produced by Dr. Johnson's rebuttal methodology is simply a time measure that is entitled to little or no weight. The CRT explicitly held that instances of carriage are a time-based measure that are entitled to little weight. *See* 1979 CRT Determination, 47 Fed. Reg. at 9893. Dr. Johnson conceded during his direct oral testimony that subscriber instances are fundamentally a time-measure that are not traditionally "at the forefront" of royalty determinations. *See* Tr. 3756 (Johnson). That point was crystallized during his rebuttal testimony. As Dr. Johnson noted, the PTV share of adjusted subscriber instances calculated by Dr. Johnson resembles PTV's share of time in the Fratrik time study. *See* Tr. 9187-88 (Johnson). The similarities were the result of the fact that Dr. Johnson made the same calculations as Dr. Fratrik, only in reverse; Dr. Fratrik weighted compensable programming minutes by subscriber instances, while Dr. Johnson weighted subscriber instances by his rough estimates of the amount of compensable programming. *See* Tr. 9184-85 (Johnson).

210. Accordingly, because Dr. Johnson's distant subscriber instances study is a time measure, it cannot be given any weight in the Panel's determination for the same reasons mentioned above with regard to the Fratrik time study.[46]

3. **"Parity" Argument**

211. Dr. Johnson's "parity" argument to support the use of his distant subscriber instances measure is contradicted by the record. Dr. Johnson has two bases of support for his "parity" argument: (1) his elaborately constructed hypotheticals; and (2) PTV's viewing shares in the Nielsen study. Both of his bases collapse, however, when viewed in light of the evidence that cable systems value PTV programming far less than they value commercial programming.

212. Dr. Johnson constructs a number of hypotheticals in his direct and rebuttal testimony to contend that cable systems should value PTV signals at a "parity" level to commercial signals. However, being hypothetical in nature only, they are not substantiated by record evidence. Given the CRT's repeated refusal to give weight to time measures, Dr. Johnson's hypotheticals cannot support PTV's burden of showing that the total amount of PTV volume equals the total amount of PTV value. As shown by the NAB's allocation of 3.5% in the 1978 Proceeding despite a relative share of time of 21% of program time, a party must place in the record evidence of marketplace value in addition to time-based measures to support its award. *See* 1978 CRT Determination, 45 Fed. Reg. at 63038 (noting that the CRT was "unable on the basis of this record to find any marketplace value for [locally produced programming]").

[46] The CRT previously rejected evidence that PTV accounted for a 11-12% of distant signal programming hours as a basis for PTV's award. *See* 1978 CRT Determination, 45 Fed. Reg. at 63040.

213. The Bortz survey results provide an indication of *actual* cable operator valuation of PTV signals that refutes Dr. Johnson's *hypothetical* parity. Were Dr. Johnson correct that cable operators valued PTV at a level of parity with commercial programming on commercial signals, that value would be reflected in the values assigned by cable operators in the Bortz survey. The Bortz survey shows that, despite the fact that PTV represents 14% of the distant subscriber instances, cable operators assign a relative value to PTV programming of 2.9%. *See* JSC Ex. 1 at 3. Even taking into account Mr. Trautman's adjustment to account for PTV-only systems, that value rises only to 3.5%. *See* Trautman W.R.T. at 5, 8. Moreover, Dr. Fairley's unweighted PTV-only adjustments of the Bortz survey only raise the PTV share by approximately 4 percentage points, far short of the level Dr. Johnson describes as parity. *See* PTV Exs. 9-R, 10-R.

214. Upon reviewing a comparison of the allocations given by individual cable operators to the PTV category in the Bortz survey with his hypothetical notion of parity based on the number of signals they carried, Dr. Johnson agreed that such an analysis would show that most cable operators generally do not value PTV at parity with commercial television. *See* Tr. 9264-65 (Johnson). Similarly, upon reviewing a comparison of the allocations given by individual cable operators to the PTV category with the percentage of overall DSE's the cable systems paid to carry PTV signals, Dr. Johnson was not surprised that cable operators would value PTV roughly equal to what was paid for those signals in terms of the DSE's carried. *See* Tr. 9291-92 (Johnson).

215. The Rosston regression analysis further contradicts Dr. Johnson's hypothetical parity. Despite the fact that PTV accounts for 20% of the programming minutes in Dr. Rosston's study, Dr. Rosston's Greater-Than-Zero regression analysis

produces a relative share of 7.5% for PTV. *See* Tr. 9225-26 (Johnson). Similarly, Dr. Rosston's Greater-Than-Or-Equal-To-One regression analysis produces a relative share of 5.5% for PTV even though PTV accounts for approximately 16% of the programming minutes. *See* JSC Ex. 14-X (showing that PTV accounts for 49.6 million of a total of 296.5 million minutes). Like the Bortz study, the Rosston regression analyses disprove any parity between PTV's share of distant signal programming volume and its relative value.

216. The record evidence show other support for the fact that PTV programming and PTV signals are not valued at a "parity" level. As discussed more in depth below, a substantial number of PTV instances of carriage are partially distant instances of carriage. As such, the cable operators carrying those signals are likely subject to the must-carry requirements, and thus may place no value on PTV as a distant programming. *See* Fairley W.R.T. at 24. While Dr. Johnson tried to minimize the effect of must-carry on the PTV parity level by suggesting that there was only a 6% increase in the amount of partially distant carriage after the must-carry rules became effective, *see* Tr. 9246 (Johnson) the record shows an explosion in the number of partially distant instances of PTV carriage. From 1992 to 1997 – the period during which the must-carry rules were implemented - partially distant instances of carriage of PTV signals grew from 108 to 190, an increase of 76%. *See* Hazlett W.D.T. at Appendix D.

217. Similarly, a lack of parity is inherent in the fact that a substantial portion of PTV distant signal carriage involves the duplication of programming the cable system already carries. As Mr. Fuller reveals in his testimony, slightly more than half of distant carriage of PTV is attributable to cable systems that already carry one or more local PTV signals. *See* Fuller W.D.T. at 3; PTV Ex. 15. In these instances, cable systems are not importing a signal full of unique programming, but obtaining some scheduling diversity and some programming diversity. *See* Fuller W.D.T. at 4-5. While scheduling diversity may be of some value to cable operators, it is unlikely that the value of such scheduling diversity reaches the level of "parity" with the unique programming available on a distant independent station such as WGN. Dr. Johnson, however, makes no effort to discount the PTV distant subscriber instances for the fact that a substantial portion of the programming is merely duplicative of programming already on local PTV signals.

218. The concept that the value of second and third PTV signals is lower than the first PTV signal carried is one that PTV itself endorsed in the 1990-92 Proceeding. In the context of attempting to calculate the hypothetical license fee revenue from distant carriage of PTV signals, Mr. Fuller estimated that cable subscribers would value a first PTV signal at $2.28, a second signal at $1.01 and the third at $0.71 – thus showing a 55% decline in value for the second signal carried. Mr. Fuller's values, however, were not theoretical like Dr. Johnson's – he based his estimates upon the actual results from a study (commissioned by NAB) of cable subscriber valuations of the broadcast signals on their cable systems. *See* 1990-92 Fuller W.D.T. at 24-25 (D4:19). Mr. Fuller's testimony shows that the distant PTV signals that duplicate local signals – which account for 72% of Dr. Johnson's distant subscriber instances, *see* PTV Ex. 16, - would be valued at a level much below "parity."

219. Dr. Johnson's reliance upon the Nielsen study to support his theory of hypothetical parity between PTV signals and commercial signals is misplaced. Dr. Johnson conceded that his reliance on the Nielsen study was conceptual in nature, and not

based on actual data. *See* Tr. 9212 (Johnson) ("I take it that that graph [used by Dr. Johnson to demonstrate his parity argument] is based upon certain assumptions that you have made. It doesn't reflect actual data, does it? A: No. It is conceptual."). Moreover, as discussed above, the Nielsen study measures distant signal viewing, and is not a direct measure of value. Accordingly, it cannot be relied upon in its own right as supporting Dr. Johnson's hypothetical parity.

220. Dr. Johnson's reference to the results of the Nielsen study also does not negate the valuations given to PTV in the Bortz survey. Dr. Johnson contends that cable operators take the amount of viewing of distant signals into account when valuing programs. *See* Tr. 9117-18 (Johnson). But he also testified that:

> Now [cable operators] don't take into account viewing data in the same way as advertisers would, but I would imagine in terms of responding to let's say to the Bortz Survey questionnaires, when they say a particular program category would be assigned a certain level, relative level of expenditure, the program operator would have in mind some notion of the popularity of that programming in terms of viewing minutes.

Tr. 9118 (Johnson). In this passage, Dr. Johnson admits that, to the extent that viewing is relevant to cable operator valuation of programming, that consideration would be reflected in the results of the Bortz survey. Accordingly, because the Bortz survey shows that cable operators do not value PTV signals or programming at "parity" with commercial signals and programming, the Nielsen study of viewing would not support Dr. Johnson's theory.

Basic Fund Awards

Basic Fund Awards

BASIC FUND AWARDS

I. JSC BASIC FUND AWARD

A. Nature of JSC Claim

221. The JSC are comprised of Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, the National Hockey League and the Women's National Basketball Association. *See* Tagliabue W.D.T. at 1. Of the JSC's members, the National Football League ("NFL") and Women's National Basketball Association ("WNBA") are participating for the first time in a cable royalty distribution proceeding. *Compare* Tagliabue W.D.T. at 1 *with* 1990-92 Stern Testimony at 2 (D5:37). The JSC represent over 200 clubs, colleges and athletic conference that are eligible to receive royalties attributable to broadcasts of professional and collegiate sports events. *See* 1990-92 Stern Testimony at 2 (D5:37).

222. JSC programming is featured prominently on superstation WGN, which carries games involving the Chicago Cubs, the Chicago White Sox and the Chicago Bulls. *See* Egan W.D.T. at 5. Indeed, the sports programming on WGN has been described as "the most significant reason that cable operators have imported WGN." Allen W.D.T. at 5. As discussed below in paragraphs 261-265, WGN was the single most widely carried distant signal in 1998 and 1999.

223. JSC programming is also distributed by cable systems regionally through the carriage of independent stations and network affiliates. WWOR and WPIX, which carried the New York Mets and New York Yankees, were carried regionally in New York to bring telecasts of the New York baseball teams to fans in upstate New York. *See* Tr. 1422 (Egan). KCAL's distribution of the Anaheim Angels to California and New Mexico cable systems is another example of regional distribution of stations carrying JSC

programming. *See* Tr. 9848-49 (Fuller). WJZ, the Baltimore CBS affiliate, was carried by cable operators throughout its region due in part to its carriage of Baltimore Orioles games. *See* Tr. 2254-55 (Alexander).

224. JSC programming is distinguishable from all the other programming represented in this proceeding. Not only is all of the JSC programming live, all of the *value* in seeing the programming is in *seeing it live*. As Dr. Crandall testified:

> The value of a live sporting event . . . largely is extinguished once the match is over, and the result is decided and posted, and everybody absorbs it.

See Tr. 829 (Crandall); *see also* Tr. 858 (Crandall) ("Once someone knows the outcome, he's not as interested in hearing about it again and again and again."). Moreover, each sporting event is unique – no game can be substituted for another. *See* Travis W.D.T. at 3. Sporting events are generally exclusive to the station televising the event – if a cable subscriber does not have the station carrying a game available to him, there usually is no alternative means of viewing it. *See* Egan W.D.T. at 4-5.

225. JSC programming is thus different from the other claimant groups in that it offers non-substitutable, live, first-run programming that is generally available on an exclusive basis. While news programming may be first-run, the same stories are repeated time and again, *see* Tr. 858 (Crandall); Tr. 2315-16 (Alexander), and there are numerous sources of news programming in television markets, *see* Tr. 2365 (Alexander); *see also* Tr. 2333-34 (Alexander) (referring to multiple news programs in market). Similarly, while PTV might have original, first run programming, PBS's national feed provides PTV stations with a large amount of repeated programming. *See* Tr. 3183-86 (Wilson).

226. Additionally, for the first time, NFL games and other valuable JSC programming such as the World Series and Stanley Cup Finals are compensable in this

proceeding. Many of these events appeared on the Fox network. The Librarian of Congress ruled that Fox network programming was eligible for compensation in the context of the 1990-92 Proceeding. *See* 61 Fed. Reg. at 55660. The impact of the addition of this programming will be discussed below in paragraphs 268-276.

B. **Value of JSC Programming As Reflected in the Bortz Survey**

227. Cable operators allocated 37.0% and 38.8% to the JSC category in the Bortz surveys for 1998 and 1999. These figures represent the relative amounts that cable operators carrying at least one distant U.S. commercial signal would have paid to carry the JSC programming on the distant signals they carried in 1998 and 1999. *See* Crandall W.D.T. at 9; JSC Ex. 1 at 6. The cable operator's allocations to the JSC category in 1998 and 1999 were the highest of any category in the Bortz surveys in those years. *See* JSC Ex. 1 at 6.

228. Once Mr. Trautman's adjustments to account for the PTV-only and Canadian-only systems are made, JSC's final adjusted Bortz survey shares are 36.6% in 1998 and 38.3% in 1999.[47] These adjusted Bortz shares should be the starting point for the Panel's award to the JSC.

229. As discussed in depth above at paragraphs 85-86 and 93-112, Dr. Fairley made a number of adjustments to account for the "automatic zero/threshold effect", the

[47] The figures cited are from Mr. Trautman's second adjustment method. If the Panel uses the same approach in valuing the PTV share and Canadians as the CARP did in the 1990-92 Proceeding – Mr. Trautman's first adjustment – the JSC's adjusted share would be 36.7% in 1998 and 38.2% in 1999. There is no net difference between the two methods in terms of JSC's share - 1998 is 0.1% higher under the 1990-92 CARP approach, while 1999 is 0.1% higher under the second approach.

PTV-only and Canadian-only systems, and for the non-compensability of WGN satellite feed programming.

230. Dr. Fairley's "automatic zero" adjustment under Method 2 is similar to the method he employed in the 1990-92 Proceeding. As discussed above in paragraphs 103-105, Dr. Fairley's Method 2 assigns hypothetical values to PTV in instances when a Bortz survey respondent does not carry a PTV signal and thus is not asked to value PTV, which JSC believe is inappropriate and contrary to law. In the 1990-92 Proceeding, the net effect of Dr. Fairley's "automatic zero" adjustment was to reduce JSC's Bortz survey share by 1.1 to 1.3 percentage points. *See* 1990-92 PTV Proposed Findings at 33. By contrast, in this proceeding, Dr. Fairley's "automatic zero" adjustment of Method 2 reduced the JSC's share by only 0.6 percentage points, *see* PTV Ex. 9-R, meaning that the overall effect of this adjustment on the JSC's share is less in 1998-1999 than 1990-92, and that the adjusted Bortz share is *higher* in 1998-98 than in 1990-92.

231. In recognition of the criticism leveled at his Method 2 approach by the CARP in the 1990-92 Proceeding, Dr. Fairley developed Method 3, which does not involve the allocation of value to the PTV category when it is not carried. *See* Tr. 10409 (Fairley). Instead, Method 3 attempts to determine whether any of the categories of programming actually carried by survey respondents would not have been carried in the absence of the compulsory license because its value fell below the "threshold" for carriage, and therefore should have a zero value. *See* Fairley W.R.T. at 43-44. Based on his calculations, Dr. Fairley found that JSC programming would be carried disproportionately more than other categories, *see* Tr. 10631-32 (Fairley) therefore necessitating and adjustment of the Bortz survey results upwards by between 3.5

percentage points and 5.1 percentage points, *see* PTV Ex. 10-R, making the JSC the biggest beneficiaries of the "threshold effect" adjustment.

232. Dr. Fairley also makes an adjustment to the Bortz survey for the percentage of compensable programming time on the WGN signal carried by cable systems. As discussed above at paragraphs 106-112, JSC do not believe that the record in this case supports the straight-line, time-based adjustment proposed by Dr. Fairley. However, should the Panel accept that adjustment or any portion thereof, JSC would be the primary beneficiary of such an adjustment; Dr. Fairley's calculations under Method 2 and Method 3 show potential increases of 5.3 to 6.8 percentage points to the JSC for his WGN compensability adjustment. *See* PTV Exs. 9-R and 10-R.

C. <u>Value Of JSC Programming Reflected In Other Quantitative Studies</u>

233. The value of JSC programming to cable operators is reflected in a number of the quantitative studies put forward in this proceeding. While the Bortz survey results are the best evidence of the relative marketplace value of JSC programming, the Canadian survey, Rosston regression analyses and the Nielsen study all show that JSC programming has significant and increasing marketplace value.

1. <u>Canadian Constant Sum Survey of Cable Operators</u>

234. The Canadian constant sum survey of cable operators that carry Canadian signals both supports the results of the Bortz survey but also confirms the substantial value of JSC programming. The Canadian survey shows that cable operators carrying Canadian distant signals placed values of 28% and 29% on JSC programming in 1998 and 1999. *See* Canadian Ex. 5-A at 13. Those values were the highest accorded to any one category in the 1998 and 1999 Canadian surveys. *See* Tr. 5692 (Ringold). The same was true with regard to the 1991 and 1992 Canadian surveys. *See* Tr. 5680-81 (Ringold). Cable

operators allocated the highest value to JSC programming despite the fact that JSC programming accounted for the smallest share of programming time on Canadian signals. *See* Canadian Ex. 4-C. The JSC's 28-29% share in the 1998-99 is essentially identical to the share used by the CARP and the Librarian to divide the value of Canadian signals between the Canadian Claimants, the JSC and Program Suppliers in the 1990-92 Proceeding. *See* 1990-92 CARP Report at 140-41; 61 Fed. Reg. 55663-64.

2. NAB/Rosston Regression Analyses

235. As discussed above at paragraphs 62-64, the Rosston regression analyses corroborate the results of the Bortz survey and are responsive to the criticism that the Bortz survey measures attitudes and not behavior. This is particularly evident in the case of JSC programming.

236. In addition to corroborating the JSC share of the Bortz survey quantitatively, the results of the Rosston regression analyses tend to show that JSC programming is the most valuable programming available on distant signals. Dr. Rosston testified that the results of his analyses show that sports is "by far and away the most valuable" programming category. Tr. 2747 (Rosston). While the Rosston Greater-Than-Zero regression analysis produced coefficients for other categories of programming within in a relatively narrow range, *see id.*, the coefficient for sports programming was more than 10 times greater than the next highest category, *see* Rosston W.R.T. at 19. Indeed, the fact that sports had the highest coefficient was one of the reasons why Dr. Rosston had confidence in the results of his analysis. Tr. 2648 (Rosston) ("Sports is substantially more valuable than the other stuff, which when I come to sort of checking the reasonableness of results makes some sense.").

237. The Rosston regression analyses – both the Greater-Than-Zero and Greater-Than-Or-Equal-To-One models – both support an increase in the JSC's royalty share. Dr. Ducey agreed that the JSC share of royalties should increase based upon the results of the Dr. Rosston's Greater-Than-Zero regression model, which results in implied 32.6% share of royalties for the JSC. *See* Tr. 1889 (Ducey). The Rosston Greater-Than-Or-Equal-To-One model supports an even greater increase for the JSC award; it results in an implied 36.9% share of the royalties for JSC.

238. The two regression analyses performed by Dr. Rosston yield the following results:

JSC Share in Rosston Regression Analyses						
Programming Category	Rosston >0 DSE (1998-99)	Rosston >0 DSE (1998 Only)	Rosston >0 DSE (1999 Only)	Rosston 1+ DSE (1998-99)	Rosston 1+ DSE (1998 Only)	Rosston 1+ DSE (1999 Only)
Sports	32.65%	30.38%	36.72%	36.95%	35.25%	40.77%

See Rosston W.D.T. at 23; Crandall W.R.T. at Appendices 3 and 4; JSC Exhibit 14-X.

3. **MPAA/Nielsen Study of Viewing Minutes**

239. To the extent that the Panel gives some weight to the relative amounts of viewing time that People Meter households devoted to the different categories of programming, the results of the Nielsen study of distant signal viewing minutes support an increase in the award to JSC. As shown above in paragraphs 169-170, on a comparative basis, the JSC's share of distant signal viewing by households increased from and average of 6.6% in 1991-92 to 9.0% in 1998 and 7.9% in 1999. *See* Tr. 7265-67 (Lindstrom).

Unlike PTV's increase in its share of viewing minutes, however, JSC's increase is not due to a large increase in the amount of programming time. *See* Tr. 7256-58 (Lindstrom).[48]

240. As noted above in paragraphs 167-171 the Program Suppliers' expert economist, Dr. Gruen, recognizes that the Panel cannot rely on the bottom-line numbers of the Nielsen study to show relative marketplace values. The Nielsen study is not a measure of value, *see* Tr. 7271 (Lindstrom), but the amount of programming consumed by cable subscribers, *see* Tr. 6551 (Kessler). The Nielsen study results are not a record of all consumption however, but just the total number of minutes that People Meter households tuned into the different categories of programming on distant signals. *See* Lindstrom W.D.T. at 5-6.

241. As a result, Dr. Gruen provided a series of avidity adjustments to derive a more appropriate measure of marketplace value. The results of Dr. Gruen's analysis showed that the "avidity factor" for JSC programming was 7 to 10 times higher than the avidity factor for any other program category. Although Dr. Gruen presented the results of avidity adjustments for the 18-49, it is also possible to calculate his avidity adjustments for the 2+ demographic as well as on a household basis:

Avidity Adjustments
Gruen Rebuttal Calculations

Category	Household Midpoint		Household Full Adj.		2+ Midpoint		2+ Full Adj.	
	1998	1999	1998	1999	1998	1999	1998	1999
Sports	36.6	30.2	45.2	45.2	39.3	32.3	47.1	39.0

[48] While the current Nielsen study provides information about viewing by demographics, there are no comparable viewing demographics from the 1990-92 Proceeding. However, the results of the 2+ demographic resemble the overall household viewing results. *See* PS Exs. 20, 22.

See paragraphs 171-178, *supra*.

242. Dr. Gruen's avidity adjustments show a strong basis for an increased award for the JSC. All of the adjustments calculated above show relative shares for JSC in excess of 30% (and up to 47%). No analysis of the Nielsen study in the 1990-92 Proceeding yielded such a high share for the JSC.

243. Regardless of any mathematical avidity adjustments, the data presented by Mr. Lindstrom and Dr. Gruen showed that the average JSC program was viewed, on average, by far more cable subscribers than any other category. The following chart shows the relative number of households viewing each JSC programming minute:

Households Viewing Average Programming Minute

Programming Type	1998	1999
Sports	21,400	19,300
Syndicated Series, Movies & Specials	2,900	3,000
Local	2,800	3,100
Non-commercial	1,500	1,300
Devotional	300	600

See PS Exs. 20 and 22.[49]

D. **Additional Evidence of the Value of JSC Programming**

244. There is substantial evidence in addition to the quantitative studies that show the high marketplace value of JSC programming. This evidence shows that JSC

[49] The number of homes is calculated based on applying the ratio of viewing minutes per minute to the number of homes represented by a household in the Nielsen study – 20,000. *See* Lindstrom W.D.T. at 6, 13 (noting that 5,000 homes in sample represent approximately 100 million homes). Household viewing minutes in PS Exs. 20 and 22 are compared to quarter hours times 15, then multiplied by 20,000. Figures are rounded to the nearest hundred homes.

members demand, and cable operators are willing to pay a substantial premium over other kinds of programming to carry live JSC sports.

1. <u>The Cable Network Marketplace</u>

245. Both the CARP and the CRT found the cable network marketplace to be a highly relevant marketplace when considering the value of distant signal programming. In the 1989 Proceeding, the CRT described the cable network marketplace to be "analogous" to the distant signal marketplace and relied in part upon the "disparity between [cable network viewing percentages and licensing fees" in determining the JSC's award. 1989 CRT Determination, 57 Fed. Reg. at 15302; *see also* Copyright Royalty Tribunal Notice of Adoption of Arbitration Panel's Determination, 1991 Satellite Carrier Rate Adjustment Proceeding, 57 Fed. Reg. 19052 (May 1, 1992). The 1990-92 CARP made this point more strongly, stating that the "simulated market" for distant signal programming "looks a great deal like the cable network marketplace" and that the ratio of cable network expenditures for JSC programming and the viewing shares for such programming was "direct evidence of supply and demand." *See* 1990-92 CARP Report at 24, 100. In the most recent proceeding setting compulsory license rates for satellite carriers to carry distant signals, the CARP held that the cable network marketplace is the "most similar free market we can observe." Report of the Panel in Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3, CARP SRA at 30 (August 28, 1997) (§ 119 CARP Report).

246. Indeed, nearly all of the other claimants have relied in one way or another on cable network data in this either this proceeding or in the 1990-92 Proceeding. PTV looked to the top-of-the-rate-card license fees of "look-alike" cable networks in an attempt to demonstrate the value of PTV distant signals. *See* PTV Ex. 21; Tr. 3518 (Fuller) (stating that it was fair to look at what cable operators are paying for cable networks to

compare relative values of programming). In the 1990-92 Proceeding, NAB attempted to make an argument about the marketplace value of locally produced news and public affairs programming based on the license fees paid to carry CNN. *See* 1990-92 CARP Report at 101-02. Dr. Gruen's testimony regarding the relevance of the 18-49 demographic is based upon data from the cable network marketplace. *See* Gruen W.D.T. at 22-24. Janice De Freitas, one of the Canadian Claimants' witnesses, pointed to the sale of Canadian-produced programs to U.S. cable networks as evidence of the marketplace value of Canadian programming. *See* De Freitas W.D.T. at 4.

247. The cable network marketplace reveals the paramount value of JSC programming in actual, free marketplaces. Among the twelve cable networks the § 119 CARP found relevant when setting the rates for the satellite carrier compulsory license, *see* § 119 CARP Report at 30, those that carry JSC programming are able to charge much higher license fees in the marketplace, *see* JSC Ex. 1 at 19. These license fees demonstrate a high level of market power for those networks with JSC programming and a correspondingly high demand for that programming by cable systems who are willing to pay steep prices for those networks.[50] Indeed, the substantial marketplace prices that cable networks carrying JSC programming are able to command are even identified as the reason why cable systems must raise their prices. *See* NAB Ex. 6-X.

---

[50] While cable operators are able to insert advertising into telecasts on these networks, Dr. Gruen's testimony shows that ESPN, for example, has lower rating than other networks, meaning there is less of an audience to reach with advertising. *See* Gruen W.D.T. at Appendix A. Moreover, it is unlikely that such revenues are a significant offset to the license fees of cable networks; Mr. Trautman testified that advertising accounts for approximately 5% of cable operators' revenues. *See* Tr. 377 (Trautman); *see also* Tr. 7791 (Gruen). Mr. Egan acknowledged that cable systems were able to obtain more

Footnote continued on next page

248. The amounts that the cable networks themselves pay for JSC programming relative to other kinds of programming also demonstrates the relative marketplace value of JSC programming despite the fact that it takes up little programming time. ESPN, TNT, TBS, Fox Sports Net and F/X paid more than $1.6 billion in 1998 and 1999 for the rights to broadcast JSC programming that accounted for a total of 2,000 hours of programming. *See* JSC Ex. 1 at 23 (Table III-3). By contrast, the A&E cable network (which PTV analogized itself to in the 1990-92 Proceeding[51]) spent less than 1/5th of that in 1998 and 1999 on nearly 14,000 programming hours – 7 times as much programming. *See id.* This 35-to-1 marketplace value ratio cannot be accounted for by advertising alone; ESPN and A&E had roughly the same audience ratings to sell to advertisers. *See* Gruen W.D.T. at Appendix A. Rather, the difference is the substantial premium JSC programming is able to obtain in the marketplace because of its ability to attract and retain subscribers. As one cable industry executive stated, sports telecasts are "'oh, wow' events" that cable networks "really do need." NAB Ex. 6-X.[52]

Footnote continued from previous page
advertising revenues from ESPN than other networks, but that such revenues were typically in the "thousands" of dollars. *See* Tr. 1323 (Egan).

[51] *See* 1990-92 CARP Report at 118-19.

[52] NAB raised the issue of whether sports rights fees are the results of market power exercised by sports teams acting collectively in selling their rights. As an initial matter, this statement is irrelevant, because the Panel is charged with simulating a marketplace without the compulsory license, not one without the compulsory license, the Sherman Antitrust Act and the Sports Broadcasting Act. However, to the extent that such collective action is relevant, the Panel should also note that the NAB, which acts *collectively* for broadcast stations supported rate regulation, must-carry and retransmission consent. Accordingly, *when broadcasters have acted collectively, the broadcasters have preferred carriage over compensation and have acted to minimize royalty payments*. Similarly, when the PTV stations have acted collectively, they have supported must-carry rights rather than marketplace compensation. Both the NAB's and PTV's "sellers' side" issues are discussed in depth in paragraphs 299-314 and 350-353 below.

249. Not only does the marketplace evidence suggest that JSC programming commands prices far in excess of other programming types relative to the amount of broadcast time it occupies, it also demonstrates that JSC programming commands prices far in excess of other programming types relative to the amount of *viewing* it receives. As noted during Dr. Gruen's testimony, ESPN obtains licenses fees far in excess of what one would expect from looking at ratings data. *See* Tr. 7629-30 (Gruen). According to the data in Dr. Gruen's Appendix A, ESPN receives only about 8% of the viewing of the top 11 cable networks but receives more than 27% of the license fees of those networks in 1998. *See id.* and Gruen W.D.T. at Appendix A. In 1999, ESPN's share of viewing decreased to about 7.5% but it received almost 29% of the license fees of the top 11 cable networks. *See* Tr. 7631-32 (Gruen) and Gruen W.D.T. at Appendix A.

250. Dr. Gruen's testimony was also consistent with the data provided by Mr. Trautman regarding the relative viewing and programming prices of JSC programming as compared to non-JSC cable network programming. According to industry data, over $1.6 billion was spent on JSC programming from the four men's professional leagues – MLB, NBA, NHL and NFL – that generated approximately 2.2 billion viewing hours. *See* JSC Ex. 1 at 23 (Table III-3). By contrast, Nickelodeon's programming generated 19.9 billion viewing hours, but cost that network only $550 million in programming expenses. *See id.* This meant that, on average, JSC programming cost about 25 times more than the programming on Nickelodeon per viewing hour. Similar ratios existed with regard to the other cable networks:

JSC vs. Cable Networks
Price-to-Viewing Ratios

Network	JSC vs. Network

A&E	22-to-1
CNN/Headline News	20-to-1
Discovery	14-to-1
Family Channel	17-to-1
Lifetime	19-to-1
MTV	15-to-1
Nickelodeon	25-to-1
TNN	10-to-1
USA	16-to-1

See id.

2. Testimony from Cable Industry Witnesses

251. The JSC was unique among the claimants in this proceeding in that JSC brought in actual cable operators to testify to the value of JSC programming. These cable operators, June Travis, Michael Egan and Judith Allen, testified as to the properties of JSC programming on distant signals that make that programming so valuable to cable systems. Their testimony was consistent with the prior testimony of cable operators and reinforces the notion that the availability of live sports programming on distant signals drives the carriage of those signals.

252. The testimony of these witnesses not only corroborates the results of the Bortz survey, but explain those results in depth. The following is a summary of their testimony in this proceeding and in prior proceedings.

* Sports programming is the reason for the compulsory license. June Travis, the former Executive Vice President and Chief Operating Officer of the National Cable Television Association (NCTA) testified that "the principle concern underlying [the NCTA's support for the cable compulsory license] has been to ensure access to sports programming on distant signals." Travis W.D.T. at 3. Ms. Travis' testimony is similar to that of James Mooney, the former President of the NCTA, who testified that sports was the primary reason that the

cable industry resisted the repeal of the compulsory license. *See* 1990-92 Mooney W.D.T. at 9 (D5:29).

* The results of the Bortz survey are consistent with industry experience. Both Michael Egan and Judith Allen testified that the results of the Bortz survey, which show an allocation of nearly 40% to live sports programming, was consistent with their experience in the industry. *See* Egan W.D.T. at 4; Allen W.D.T. at 4. Ms. Allen described distant signal sports programming as the "single most valuable type of distant signal programming." Allen W.D.T. at 4. Trygve Myrhren, another cable executive, testified in the 1990-92 Proceeding that he agreed with the results of the Bortz survey. *See* 1990-92 Myhren W.D.T. at 5 (D5:30). Mr. Egan testified subscribers felt they same way; during his career in the cable industry, his company would survey its subscribers and it found that sports and movies (the top two categories in the Bortz survey) "typically come up as the top categories everywhere." Tr. 1393 (Egan).

* Distant signal sports programming is uniquely valuable. All of the cable industry executives testified that the sports programming on distant signals had unique value. Ms. Travis testified that "live sports programming is unique – no game can be substituted for another," which means that adding a distant signal with sports programming allows a cable system to "offer customers something that is generally not available elsewhere." Travis W.D.T. at 3. She testified that "sports programming is kind of unique in that live sports are a one-time only event. And if we have the ability to carry and deliver that to our customers, they have to be our customers in order to access that programming." Tr. 1488 (Travis). Mr. Egan testified that "sports programming is generally exclusive to the station televising the event" meaning that sports fans would need to subscribe to cable to receive a distant signal carrying the sports telecast. *See* Egan W.D.T. at 5. Ms. Allen testified that the sports programming on a distant signal "provides potential and actual subscribers with that type of unique programming [that motivates subsciptions]." Allen W.D.T. at 5. *See also* 1989 Wussler W.D.T. at 2-3 (D5:27) (describing sports programming as "truly first run" with "relatively limited availability and critically important to attracting subscribers).[53]

[53] While other types of programming may be live and unique, such as newscasts, that programming may be available from other sources, thereby diluting its value. As Mr. Egan testified, sports telecasts are generally exclusive. *See* Egan W.D.T. at 5. However, multiple stations in a market will have competing newscasts. *See, e.g.*, Tr. 2333, 2364-65 (Alexander) (discussing newscasts of competing stations).

* Cable operators must be responsive to sports fans. As James Mooney testified in the 1990-92 Proceeding, sports fans are the largest group of cable subscribers, and their demands must be met. *See* 1990-92 Mooney W.D.T. at 11 ("not all cable subscribers are sports fans are cable subscribers", and the easiest way to make them unhappy is to cut off their access to teams they follow"). Mr. Mooney referred to a local example of the motivation of cable systems to respond to subscribers; when the Fairfax County, Virginia cable system removed WGN, a group calling themselves "Citizens for the Cubs" organized to restore WGN to the lineup, putting incredible pressure on the cable system until it agreed to carry WGN once more. *See* 1990-92 Mooney W.D.T. at 11-12. Another group of fans in California had bumper stickers emblazoned "No Cubs, no cable." 1990-92 Tr. 1845 (Maglio) (D6:8). Ms. Travis agreed that "[s]ports fans are intensely loyal to their teams and sports . . . [t]he deletion of a distant signal with sports programming . . . will invariably create a great deal of outrage." She noted that cable operators "react strongly to customers' opinions when signals are added or dropped because those customers who complaint are often willing to drop their cable service, especially given the advent of DBS as a competitive service." Travis W.D.T. at 4. Mr. Egan testified that sports fans are "highly motivated and loyal cable subscribers" Egan W.D.T. at 4, and that "[i]f a [sports fan] can not see his team play . . he is likely to complain and cable operators are, therefore, reluctant to remove distant signals that provide this valuable sports programming," *id.* at 5. This is not the case with other types of programming - loyal PTV viewers, for example, tend to be cable "resisters" in the first place. Tr. 6157 (Allen) ("People who are very big fans of PBS are a category of cable resisters in my experience, . . . therefore, they are not a good target, again, much to my marketing hat chagrin, for purchasing a larger package of many more choices of cable channels in a cable television subscription.")

* Distant signals are a relatively inexpensive source of sports programming. The cable operators agreed that sports programming is becoming increasing expensive in the marketplace. *See* Allen W.D.T. at 5 ("It became an accepted (but unwanted) fact in the industry that sports programming is the most costly type of programming"); Egan W.D.T. at 4 ("[c]able operators generally pay more for sports programming than other types of programming on cable networks."). In this regard, distant signals sports programming is valuable as an inexpensive source of programming that would otherwise command high prices in the open marketplace. *See* Travis W.D.T. at 6 ("the unique sports programming shown on relatively inexpensive distant signals would have become more valuable to cable operators at the end of the 1990s than at the beginning of the decade."); Egan W.D.T. at 5-6 ("we viewed the compulsory licensing royalty we paid for WGN to

be quite reasonable in comparison to what we were required to pay for other sources of sports programming"); 1990-92 Mooney W.D.T. at 10 ("absent the compulsory license, a distant signal . . . would not as a practical matter have the ability to contract for national distribution of an individual team's sports programming").

* Sports programming is the reason to import WGN. Several cable witnesses testified that they imported WGN as a distant signal specifically because of the sports programming broadcast by WGN. Mr. Egan testified that his cable system in Jackson, Tennessee added WGN to bring games involving the Chicago Cubs. *See* Egan W.D.T. at 5. Ms. Allen stated that "the sports programming on WGN is the most significant reason that cable operators have imported WGN." Allen W.D.T. at 5.

E. **The Seller's Perspective**

253. The "seller's perspective" should not merit a reduction in the JSC's share from that shown in the Bortz survey, the Rosston regression analyses or the Gruen avidity adjustments. The nature and relevance of the "seller's perspective" is discussed in depth above in paragraphs 65-72. There is no record basis for adjusting the JSC award downward to account for the "seller's perspective." On the contrary, there is significant evidence that, among all the claimants, the JSC would be the most difficult negotiator in the distant signal marketplace absent the compulsory license.

254. As Dr. Crandall testified, there is no economic reason why concerns about the "seller's perspective" would justify the JSC receiving an award less than their Bortz survey share. *See* Crandall W.D.T. at 11-12. Dr. Crandall found no evidence in the record of "JSC's relative willingness to supply programming" that would have "resulted in a lower share of royalty revenues than was reflected in the Bortz survey." *Id.*

255. The JSC would have significant incentives to demand the highest prices (or even withhold) for JSC programming in a marketplace absent the compulsory license. In the 1990-92 Proceeding, JSC offered the testimony of Bryan Burns, formerly the Senior

Vice President of Major League Baseball, and architect of MLB's national cable rights deal with ESPN. In his testimony, Mr. Burns explained that distant signal importation of sports telecasts impairs the ability of league members to license their rights to local and national media outlets, including in negotiations with ESPN. *See* 1990 Burns W.D.T. at 8 (D5:33). Similarly, Commissioner of Baseball Fay Vincent testified in the 1989 Proceeding that MLB receives "significantly less compensation than would be produced in the marketplace." 1989 Vincent W.D.T. at 5 (D5:32).

256. The JSC would be, as the record shows, the toughest negotiators in the marketplace and the most likely to withhold their product. During the debates on the Copyright Act, the sports leagues successfully urged Congress to extend copyright to live sports telecasts, which they believed would give them the ability to control cable retransmissions of distant signal sports telecasts. *See, e.g.* Hearings on S. 1361 Before the Subcomm. on the Judiciary, 93d Cong., 1st Sess. 526-32 (1973) (testimony of James B. Higgins representing the NCAA); *id.* at 533-36, 536-47 (testimony of Bowie Kuhn, Commissioner of Baseball); *id.* at 551-52 (statement of J. Walter Kennedy, Commissioner of the NBA). However, with the 1976 Copyright Act came the § 111 license, of which the JSC's members have actively sought the repeal.

257. Apart from the lobbying environment, there is marketplace evidence of why the JSC would demand the highest prices for its programming or seek to withhold that programming from cable systems seeking to import it on a distant signal. Dr. Joskow acknowledged that the JSC's members would have a substantial interest in blocking the importation of distant signals in order to maximize their sale of rights both locally and nationally. *See* Tr. 9083-85 (Joskow). In practice, the NBA has sought to limit the

number of Chicago Bulls games that can appear on WGN – activity that indicates the NBA's unwillingness, were it to act in a free marketplace, to license its programming at any cost. *See* Tr. 697-98 (Crandall) (referencing Dr. Crandall's discussion of litigation between the NBA and Chicago Bulls). Unlike broadcasters, owners of sports programming have no incentive for broader carriage of their product because they would not obtain excess fees from the additional distant carriage of their programming. *See* Tr. 707-08 (Crandall) ("But in the case of the broadcast station which is licensing its copyright material in an adjacent market, it obtains the ability to sell more advertising dollars, obtain more advertising dollars from that greater geographical expanse of its market. The NFL, Major League Baseball, do not."). Indeed, as demonstrated above in paragraphs 245-250, JSC members are excellent at extracting the maximum value for their programming.

258. Accordingly, there is no record basis to concluded that an adjustment of the Bortz survey results to account for the "seller's perspective" would necessitate a reduction in the JSC's share.

F. **Changed Circumstances**

259. The relative marketplace value of JSC programming on distant signals increased as a result of changed circumstances between 1992 and 1998. The rise of WGN to be the predominant distant signal carried by cable systems, the addition of NFL telecasts, the SuperBowl, the World Series and other Fox sports programming to the JSC's claim, and the increasing value of sports programming vis-à-vis other types of programming since 1992 significantly outweigh the fact that the JSC were one of four claimants that had compensable programming on WTBS before its conversion into a cable network.

260. Although some of the parties focused exclusively on the WTBS conversion, there were a myriad of other changes in the distant signal marketplace that affected the relative marketplace of JSC programming and the programming of the other claimants. Indeed, Dr. Johnson, one of the witnesses who focused most heavily on the WTBS conversion recognized that the WTBS conversion was not the *only* factor in the marketplace to change between 1992 and 1998. *See* Tr. 3666 (Johnson). Had it been so, Dr. Johnson would have simply limited his recommendation for the adjustment of the PTV share to about 7%. *See* Johnson W.D.T. at 7. Mr. Bennett, one of the Canadian witnesses, backed off from his written statement that the royalty fund has decreased substantially as a result of the WTBS conversion in light of Dr. Hazlett's more nuanced analysis. Tr. 5438-5443 (Bennett). And certainly, the testimony of Dr. Hazlett shows that there were numerous factors that impacted the distant signal marketplace and the copyright royalty fund, including rate regulation, must-carry, retransmission consent, re-classification of signals from distant to local, and WWOR's loss of satellite carriage. *See generally* Hazlett W.D.T. at 5-9. The most significant of these changed circumstances and how they impact JSC are set forth in detail below.

1. **WGN Prominence**

261. One of the most significant aspects of the WTBS conversion was that it left WGN as the most widely carried distant signal. The carriage of WGN relative to other distant signals exceeds that of WTBS even in its heyday; WGN accounted for 55% of all DSE's in 1998, WTBS accounted for 38% of all DSE's in 1992. *See* Hazlett W.D.T. at

Appendix D.[54] WGN grew from representing 18% of all subscriber instances in 1992 to 48% in 1998, meaning that, at least for the purposes of the Fratrik time study, one minute on WGN was worth as much as one minute on all of the other stations carried as a distant signal combined. *See* Tr. 2130-32 (Fratrik).

262. The ascension of WGN to dominance among distant signals favors the JSC because WGN features highly valuable JSC programming. WGN carries the Chicago Cubs, the Chicago White Sox and the Chicago Bulls. *See* Allen W.D.T. at 5. As noted by Dr. Ducey, the fans of the Chicago Cubs are a "special breed" with a "fierce and loyal following." Tr. 1985 (Ducey). The carriage of WGN over the years has generated a widespread fan base for the Chicago Cubs, given that in many places the Cubs were the only team that cable viewers could watch on a regular basis. *See* Tr. 1499 (Travis).[55] As noted above, fans of the Chicago Cubs in suburban Virginia – hardly the Cubs' home territory – waged a campaign to bring back WGN after it had been dropped by their local cable system. *See* 1990-92 Mooney W.D.T. at 11-12 (D5:30). The Chicago Bulls in 1998 featured Michael Jordan, one of the most popular basketball players of all time. *See* Egan W.D.T. at 5.

263. The Chicago Cubs games on WGN were particularly valuable in 1998. A home run race between Sammy Sosa and Mark McGwire generated a lot of enthusiasm and interest among baseball fans around the country. *See* Tr. 4207 (Lyon). Interested fans could watch the home run race unfold on WGN. *See id.* Mr. Wilson, PTV's witness and a

[54] WTBS accounted for 2109 of 5584 DSE in 1992, while WGN accounted for 1351 of 2464 DSE in 1998. *See* Hazlett W.D.T. at Appendix D.

[55] The Chicago White Sox also have a loyal following.

Cub fan (thus demonstrating the geographical distribution of the "special breed"), described the home run race as quality television programming. *See* Tr. 3074 (Wilson).

264. The JSC programming on WGN not only was highly valuable, it was the reason cable systems carried WGN. Mr. Egan testified that, when he was managing a cable system in Tennessee, he decided to import WGN as a distant signal specifically because of the sports programming available on WGN. *See* Egan W.D.T. at 5. Ms. Allen testified that the "sports programming on WGN is the most significant reason that cable operators have imported WGN." Allen W.D.T. at 5.

265. JSC programming accounted for an even greater percentage of the compensable programming in 1998 and 1999 than in 1990-92. Whereas MLB games accounted for approximately 8.1% of the compensable programming time on WGN in 1992, those games accounted for 11.3% of the compensable programming time in 1998. *See* Tr. 8980-82 (Ducey); JSC Ex. 52-RX.[56]

2. <u>Overall Reduction In Distant Signal Programming</u>

266. The period 1992 to 1998 showed an overall decrease in the volume of distant signal programming. However, this decrease neither disproportionately affected the JSC nor does it have any implications as to the relative marketplace value of JSC programming. There are several reasons for the overall reduction in the level of distant signal programming. The conversion of WTBS into a cable network and WWOR's loss of satellite carriage reduced the amount of distant signal programming absolutely for the Program Suppliers, the NAB, the JSC and the Devotional Claimants, all of whom had

[56] While JSC 52-RX is not in the record for substantive purposes, the data that are the basis for that particular exhibit are in the record through the testimony of Dr. Ducey in this proceeding and Mr. Lemieux in the 1990-92 Proceeding. *See* Tr. 8980-82 (Ducey).

programming on WTBS. *See* Hazlett W.D.T. at 8. Additionally, the redefinition of when a broadcast station is "local" to a cable system turned a substantial number of distant signals into local signals. *See id.* at 19-20. The adoption of the must-carry and retransmission consent rules and the tendency of those rules to "squeeze out" distant signals also caused a reduction in the amount of distant signal programming. *See id.* at 15-18.

267. Despite all of these changes that reduced the amount of distant signal programming, the JSC's relative share of distant signal programming, as measured by Dr. Fratrik, remained constant between 1992 and 1998-99. Dr. Fratrik's time study shows that JSC's share of distant signal programming minutes as weighted by subscribers increased slightly between those periods, from 4.75% to 4.91%. *See* NAB Ex. 10 at 13. Dr. Fratrik's study shows that the overall reduction in distant signal programming did not affect the relative amount of available JSC programming.

3. **JSC on Fox**

268. One of the significant changed circumstances for the JSC from the 1990-92 Proceeding is the addition of JSC programming on Fox network stations to the JSC's claim. The Fox network, while having no JSC programming in 1990-92, exploded on the scene during the 1990's to purchase the rights some of the JSC's most valuable telecasts. Fox broadcast approximately 200 NFL games in 1998 and 1999, including the playoffs and the Super Bowl in 1999. Similarly, Fox carried a significant MLB package, including telecasts of Games of the Week, the playoffs and the World Series.

269. Although Fox stations are carried by only a small percentage of cable systems as a distant signal, that percentage is larger than the number of systems that carry Canadian signals, and not substantially smaller than the number of systems carrying PTV

stations as distant signals. Both PTV and the Canadian Claimants receive meaningful royalty awards, and there is no reason to believe that the JSC programming on Fox would not require a similar award.

a. Types Of JSC Programming On Fox

270. Prior to 1994, NFL games were carried only by broadcast networks and cable networks whose programming is considered ineligible for compensation in this proceeding. *See* Tagliabue W.D.T. at 1. As discussed in the testimony of Commissioner Paul Tagliabue, the Fox network broadcast approximately 200 NFL games in 1998 and 1999, including several playoff games in both years and the Super Bowl in 1999. *See* Tagliabue W.D.T. at 1-2. Fox generally broadcast the games involving the National Football Conference, which includes some of the oldest NFL franchises in the largest markets, like the New York Giants, Chicago Bears, Washington Redskins and Philadelphia Eagles. *See id.* at 2; Tr. 141-42 (Tagliabue) (NFC includes teams in 9 of the top 10 television markets).

271. In addition to broadcasting NFL games, Fox carried some of the most valuable programming of the other JSC members. Fox carried Major League Baseball games of the week, playoff games, the All Star Game and the World Series in 1998 and 1999. *See* Tr. 579 (Trautman). Mr. Trautman indicated that this high-value JSC programming on Fox likely sustained the high value of sports programming in the Bortz survey. *See* Tr. 580 (Trautman).

b. Value Of JSC Programming On Fox

272. As Commissioner Tagliabue testified, approximately 230 cable systems carry a Fox station as a distant signal. *See* Tagliabue W.D.T. at 6. Altogether, these 230 systems paid a total of $12 million in royalties during the 1998-99 period. *See* Tr. 168

(Tagliabue). For 100 of those systems, the distant Fox signal was the only Fox signal they carried. *See id.* David Bennett testified that for such systems, the ability to import the JSC programming on Fox via a distant signal would bring a "great deal" of value to a cable operator. *See* Tr. 5403 (Bennett). Indeed, the only way these cable systems could bring the Super Bowl to their subscribers would be through their importation of a Fox distant signal. *See* Tr. 138 (Tagliabue).

273. Even in those situations where a cable system already has a local Fox affiliate, the JSC programming on the distant Fox signal may be highly valuable to that system. As discussed by Commissioner Tagliabue, Fox stations in nearby markets often carry different NFL games on any given Sunday. *See* Tagliabue W.D.T. at 2. He testified that of the 130 systems carrying duplicate local and distant Fox signals, approximately half of those systems would see the two Fox affiliates carry different games on at least a periodic basis, with 40 carrying two different NFL games on a regular basis. *See* Tr. 136 (Tagliabue). Mr. Alexander testified that bringing in different telecasts of NFL games would bring "clear value" to cable systems. *See* Tr. 2360-61 (Alexander).

274. While the carriage of distant Fox signals pales in comparison to the breadth of carriage for WGN, it is comparable to the carriage of PTV and Canadian signals. As shown in the following chart, cable system carriage of Fox distant signals falls in between cable system carriage of PTV and Canadian signals:

Distant Carriage Comparison
PTV, Fox & Canadian Signals

Signal Type	Total # Of Cable Systems Carrying As Distant		Total # Of Cable Systems Carrying W/O Local	
	1998-2	1999-2	1998-2	1999-2
PTV	514	534	256	270
Fox	235	234	100	106
Canadian[57]	66	61	--	--

275. Like the PTV and Canadian stations, the Fox stations would have become a relatively larger portion of the distant signal universe when WTBS converted to become a cable network, indicating that if PTV and the Canadian Claimants were to obtain an increased share because of the WTBS conversion, the JSC programming on Fox would tend to increase the JSC share by a similar amount.

276. The NFL programming on Fox has a particularly high marketplace value, and it is particularly useful to compare that marketplace value to the other small categories of signal carriage, PTV and Canadian. Commissioner Tagliabue testified that the license fees paid by Fox increased from $395 million per year in the prior period (1994-1997) to $550 million per year for the years 1998-2005. *See* Tagliabue W.D.T. at 3-4. Accordingly, the NFL's licenses fees for 100 NFL games per year (300 hours of programming) exceed the total amount paid by PBS to acquire all of the programming for the PBS National Programming Service feed. *See* Tr. 3167 (Wilson) (citing $350 million as the cost of programming for the NPS).

[57] PTV figures are derived from PTV Ex. 15, Fox figures are derived from NAB 1-X, and Canadian figures are derived from Canadian Ex. 5-A at 6 (Ringold Report).

4. Regional Sports Networks

277. As in the 1990-92 Proceeding, several parties tried to raise the argument that JSC programming is less valuable because of the "rise" of regional sports networks ("RSN's"). There was no such comparable "rise" in RSN's in the 1992 to 1998 time period as was experienced in the period before 1992. In any case, any increase in the number of RSN is more than offset, on a relative basis by the increasing number of regional news networks and PBS-look alikes that are widely carried by cable operators. As in the last proceeding, the record shows that the existence of RSN's cause little or no dilution of the value of distant signal sports programming.

278. In many ways, the existence of RSN's demonstrate the value of JSC distant signal programming. In the 1990-92 Proceeding, the CARP held that the increased entry of PBS "look-alike" networks "reflects the perception of value" of PTV programming. *See* 1990-92 CARP Report at 123. No less can be true of RSN's; as Mr. Trautman testified, RSN's command higher license fees than any of the networks he uses in the comparisons he included in his written testimony. *See* Tr. 280 (Trautman). The high license fees of the RSN's underscore the value of importing distant signals on a regional basis. *See* Tr. 1422 (Eagan) (noting importation of WWOR and WPIX in upstate New York for access to New York baseball teams). Indeed, as the costs of sports networks rise, distant signals become even *more* valuable from an opportunity cost standpoint because they are a relatively inexpensive source of sports programming. *See* Travis W.D.T. at 6.

279. The testimony adduced demonstrated the relatively small impact of the rise of RSN's on the value of sports programming. In that proceeding, Program Suppliers that there had been a proliferation of RSN's in the years leading to 1990-92, and that this explosion diluted the value of JSC programming. *See* 1990-92 CARP Report at 96.

However, most cable systems would only have access to one RSN, which, as the name implies, are distributed only regionally. *See* 1990-92 Tr. 9013 (Cooper) (R2:1). This stood in stark contrast to the national cable networks, which provided *cumulative* programming choices to cable operators. *See* 1990-92 Tr. 9012 (Cooper) (R2:1) (noting national availability of other stations). As such, the dilutive effect of the rise of *regional* sports networks pales in comparison to the dilutive effect of the steep increase in *national* cable networks on other types of programming. As Ms. Travis testified:

> [In contrast to sports programming], the other types of programming on distant signals would have become less valuable to cable operators due to the increase in the number of programming networks overall. In the 1990's, the number of cable networks focusing on a variety of different types of programming increased greatly. The value of similar, duplicative programming on distant signals would have been diluted by the availability of these new networks.

Travis W.D.T. at 6.

280. Indeed, as Ms. Travis testified, one of the prevailing trends of the 1990's was the rise of direct broadcast satellite ("DBS") services. To make inroads into cable's customer base, DBS providers directed their marketing efforts at cable customers who wanted access to more sports programming. *See id.* at 5. The results of these marketing campaigns were to force cable systems to place a higher premium on sports programming following the growth of DBS, and to ensure that they provided as much sports programming as possible. *See id.* at 6. As such, distant signal sports programming – a cheap source given the statutory rates – became an even more valuable source of sports. *See id.* Accordingly, the record indicates that any subsequent growth of RSN's would have had little or no dilutive impact of the rising value of JSC distant signal programming.

G. Recommended Award

281. The record supports an award to JSC that equals their Bortz shares in 1998 and 1999 as adjusted by Mr. Trautman to account for the PTV-only and Canadian-Only systems. These values are consistent with all the other evidence introduced in the proceeding, which showed the JSC programming was the most popular distant signal programming and valued most highly by cable system operators.

282. The record shows that the JSC's award in the 1990-92 Proceeding substantially undervalued JSC distant signal programming. There is no basis for a downward adjustment from the 1990-92 award – in fact, circumstances have changed substantially in favor of the JSC. Moreover, given the downward adjustments warranted for several other parties, and in light of the substantial increases that would result from the adoption of some of the adjustments proposed to the Bortz survey, the Trautman-adjusted Bortz shares are likely the lower bound of the relative marketplace value of JSC distant signal programming in 1998 and 1999. Accordingly, JSC request an award of 36.6% and 38.3% of the royalties awarded to the Phase I programming claimants in 1998 and 1999, respectively.

II. NAB BASIC FUND AWARD

A. Nature of NAB Claim

283. The NAB claim, as defined, is programming that is produced by a commercial television station and is broadcast exclusively on that station. *See* Ducey W.D.T. at 3. As Dr. Ducey admits, the great majority of the NAB category is station-produced news. *See id.* at 12. Almost by definition, the programming included in the NAB category is of local appeal and of low value outside its market – if a particular NAB

program obtained some measure of success and were sold to a different television station in a different market, that program would drop out of NAB claim and into the Program Suppliers claim.

284. As discussed in the cross-examination of Dr. Fratrik, the vast majority of the NAB program category is local news and public affairs programming. *See* Tr. 2167-70 (Fratrik) and JSC Ex. 10-X. In fact, news and public affairs programming appeared to be an increasing portion of the NAB category; the two most widely carried superstations, WGN and WPIX both exhibited increases in the percentages of station-produced programming in the news and public affairs category between 1992 and 1998. *See* JSC Ex. 10-X (showing WGN increase from 85% to 94% and WPIX increase from 86% to 94%).

285. Not only is the NAB category predominantly news and public affairs programming, the data underlying the Fratrik study demonstrates that the NAB category is mostly the *superstation* news and public affairs programming that has little value to cable operators in distant markets. JSC Ex. 11-X shows that, between 1992 and 1999, the portion of the NAB category attributable to superstation news and public affairs programming swung from 25% to almost 60%. As the CRT concluded, local news and news and public affairs programming has been credited for having regional appeal, but not beyond the close-in regions. *See* 1989 CRT Determination, 57 Fed. Reg. at 15302. Because superstations (WGN being the only widely distributed one remaining) are distributed nationally via satellite, their news and public affairs programming logically falls into CRT's "lack of appeal" category. In fact, the record supports the CRT's theory in this regard – it was revealed that WGN's three-hour morning news program is covered

over on WGN's national satellite feed. *Compare* PTV Ex. 12-X *with* PTV 13-X. Dr. Ducey suggested that the news program was covered over because WGN's satellite carrier thought the morning news "was interesting in Chicago but not nationwide." Tr. 1955-56 (Ducey). Mr. Fuller concurred, noting that despite the fact that he received WGN, he had never watched the WGN news, and that local Chicago news would have no interest to those around the country. *See* Tr. 3363 (Fuller). Mr. Alexander testified that the bulk of local news is focused on issues that affect the particular station's market. *See* Tr. 2311 (Alexander).

286. Moreover, much of the news and public affairs programming is cumulative. Mr. Alexander testified that portions of his stations' newscasts may be repeated throughout the day or from the previous day. *See* Tr. 2315-16 (Alexander). Mr. Alexander's examples of the station-produced programs on his stations reinforce the duplicative nature of the programming in the NAB category; WJZ broadcast back-to-back newscasts at 5 p.m. and 6 p.m., while KYW broadcast back-to-back-to-back newscasts at 5:30 a.m., 6 a.m. and 7 a.m. in addition to back-to-back newscasts at 5 p.m. and 6 p.m. *See* NAB Ex. 9. Mr. Alexander testified that broadcast stations generally have added additional newscasts to their schedule – mostly for the purpose of scheduling diversity. *See* Tr. 2333 (Alexander).

B. **Value Of NAB Programming As Reflected In Bortz Survey**

287. Cable operators assigned the "News and public affairs" programming category an allocation of 14.8% in the 1998 Bortz survey and 14.7% in the 1998 Bortz survey. That allocation trails the allocation to the "live professional and college team sports" category by between 22 and 24 percentage points. *See* JSC Ex. 1 at 3. The allocations to the "News and public affairs" category in the 1998 and 1999 Bortz surveys

are statistically the same as the allocations in the 1990-92 Bortz surveys given the overlap in the confidence intervals of those surveys. *See* JSC Ex. 1 at 54-55 (1998-99 confidence intervals); 1990-92 Trautman W.D.T. at 27-37 (D2:4) (1990 and 1991 confidence intervals); 1990-92 Bortz W.D.T. at 31 (D2:2).

288. It is important to note that Dr. Fairley's adjustments to the Bortz study have a mixed effect on the NAB category. As an initial matter, NAB is the biggest beneficiary of Dr. Fairley's improper use of unweighted data in making his adjustments. While the NAB category's weighted allocations in the Bortz surveys are 14.8% and 14.7% in 1998 and 1999, respectively, Dr. Fairley's unweighted allocations show shares of 16.4% and 15.1% – collectively 3% higher than the weighted shares. *See* PTV Ex. 10-R. Given the size of the cable fund, the use of unweighted data unfairly grants NAB a $3 million bonus.

289. However, Dr. Fairley's "threshold effect" adjustment in Method 3 results in a reduction in NAB's share. This reduction is the product of Dr. Fairley's statistical prediction that, in the hypothetical marketplace, NAB programming would be carried disproportionately less often than other categories of programming. *Cf.* Tr. 10631-33 (Fairley) (referring to JSC category gain and Devotional category loss from "threshold effect" adjustment).

C. <u>NAB Shares In Other Quantitative Studies</u>

1. <u>Rosston Regression Analyses</u>

290. When the years 1998 and 1999 are combined, the Rosston Greater-Than-Zero regression analysis produces an implied royalty share of 10.9% and the Rosston Greater-Than-Or-Equal-To-One regression analysis produces an implied royalty share of 10.0%. *See* Rosston W.D.T. at 23; JSC Ex. 14-X. However, when the years 1998 and 1999 are separated, NAB's shares of the Greater-Than-Zero regression analysis are

13.35% in 1998 and 8.62% in 1999 and NAB's shares of the Greater-Than-Or-Equal-To-One regression analysis are 12.53% and 7.55%, respectively. *See* Crandall W.R.T. at Appendices 3 and 4. It must be noted, however, that the NAB share implied by the Rosston regression analyses are not statistically significantly different from 0% in 1999 under both models. *See id.* at 5. Thus, Dr. Rosston's regression model cannot reject the hypothesis that an additional minute of NAB programming contributed would have had no impact on the amount of royalties a cable operator would have to pay. *See id.*

291. As discussed above, the Rosston regression analyses cannot act a starting point for allocating shares. Furthermore, Dr. Ducey recognized that the NAB's results in the Rosston regression analyses could be adjusted either up or down to account for other factors. *See* Tr. 1892 (Ducey). Indeed, Dr. Ducey recognized that because Dr. Rosston was relating programming minutes to royalties that were not set in the marketplace, his model would not directly measure the free market seller's perspective. *See* Tr. 1898 (Ducey).

292. Dr. Rosston suggests that the NAB number may be a lower bound to NAB's relative marketplace value because it does not take into account a broadcast station's efforts in putting together a broadcast day. The CRT repeatedly rejected the concept that a broadcast day compilation was compensable from the cable royalty fund. *See, e.g.*, 1978 CRT Determination, 45 Fed. Reg. at 63032 ("Our review of [the legislative] history persuades us that Congress did not intend compensation to broadcaster claimants on the basis of the "broadcast day. . . ."). NAB offers no new evidence or argument to support a departure from the CRT's precedent.

2. Nielsen Study

293. The Nielsen study reflects a relative share of distant signal viewing minutes of between 12.9% to 14.8%, depending upon whether viewing is measured by households or the 2+ demographic. *See* PS Exs. 20 and 22.

294. However, as discussed above in paragraphs 171-178, the Nielsen study viewing numbers cannot be employed without adjustment. As shown above, Dr. Gruen's avidity adjustments (both in his original and rebuttal testimony) substantially reduce NAB's viewing share down to as low as 4.0% in 1998 based on the full avidity adjustment in the 18-49 demographic. In the 2+ demographic, NAB is reduced to 10.2% and 11.8% in 1998 and 1999 using the "midpoint" adjustment and down to 9.1% and 10.9% in 1998 and 1999 using the "full avidity" adjustment.

295. NAB aggressively criticized the Gruen avidity adjustments on the grounds that they improperly advantaged programming with wide carriage (such as on superstations) versus programming carried on stations with less distribution. *See* Ducey W.R.T. at 7-8. However, the slant of Dr. Gruen's analysis towards superstations should actually have been a *positive* for the NAB – as shown in JSC 11-X, approximately 60% of NAB's programming is accounted for by news and public affairs programming on superstations. Given the wide carriage of a majority portion of its programming, the *downward* adjustment generated by the Gruen avidity adjustments are an actual indication of the relative lack of avidity for its programming.

3. Fratrik Time Study

296. As discussed above with respect to the Fratrik time study, both NAB's absolute share of distant signal programming time and the change in its share from 1992 to 1998-99 is irrelevant to the relative marketplace value of NAB programming. Dr. Ducey

admitted as much when he testified that NAB's greater share of distant signal programming time did not necessarily lead to a commensurate increase in NAB's relative marketplace value. *See* Tr. 8983 (Ducey). As noted above, the NAB received a 3.5% award in the 1978 Proceeding despite the fact that station-produced programming accounted for 21% of the weighted distant signal programming time according to a study it sponsored. *See* 1978 CRT Determination, 45 Fed. Reg. at 63030, 63038.[58] Despite the fact that NAB's share of weighted distant programming time has decreased from that point – hitting 8.8% in 1992 according to the Fratrik study - the NAB's share of royalties has actually increased in these proceedings. NAB cannot have it both ways – it cannot contend that changes in time measures support an increase in its award when they are positive for NAB when it consistently increased its share when those same time measures traveled in the opposition direction.[59]

D. **Additional Evidence Of The Value of NAB Programming**

297. Other indications of the relative lack of marketplace value of NAB distant signal programming were apparent from the record. Mr. Alexander testified that even though he believed KYW has the best news in Philadelphia, he would not be surprised that a station with much inferior news programming that broadcast the games of Philadelphia

---

[58] Regardless of NAB's attempted redirect examination on this issue, the CRT apparently accepted the NAB study as correct and assumed that NAB programming did account for 21% of distant signal programming time, but found that measure to be irrelevant. *See* 1978 CRT Determination, 45 Fed. Reg. at 63038. It is immaterial that, in hindsight, NAB would have performed its 1978 time study differently.

[59] Indeed, Dr. Ducey testified on rebuttal that NAB programming accounted for 12-14% of the programming time on distant signals. *See* 1990-92 Ducey W.R.T. at 4 (D4:17). Accordingly, when the CARP allocated its award to NAB in the 1990-92 Proceeding, it would have done so under the assumption that NAB programming made up 12-14% of the time, which is essentially the same amount shown in the Fratrik time study.

sports teams would get more extensive distant signal carriage. *See* Tr. 2366-67 (Alexander). He further testified that complaints from subscribers about a cable system's decision to drop WJZ may have been motivated by lack of access to Baltimore Orioles telecasts. *See* Tr. 2371 (Alexander). Indeed, while WJZ had about the same level of distant carriage in 1992 as in 1998, *see id.*, KYW's distant carriage had decreased during the same period, *see* Tr. 2402-05 (Alexander).

298. Moreover, historically, the NAB's case focused on the value of station-produced programming on network affiliates, where most of NAB's programming is carried. The decline in the carriage of those signals is discussed below in paragraphs 315-322. However, these network affiliates also can be viewed by consumers within their Grade B signal contour, meaning that subscription to cable is not necessary to view their programming. *See* Tr. 2376 *et seq.* (Alexander) (discussing viewership within station's Grade B contour). Accordingly, there is evidence that such programming is not material in attracting or retaining subscribers – it is not programming exclusively available via a subscription to cable.

E. **<u>The Seller's Perspective</u>**

299. The NAB's award should be substantially lower than its results in the quantitative studies in this proceeding to take into account the seller's perspective. The broadcasters that constitute NAB's claimant group obtain substantial benefits from the carriage of their programming in distant markets and, acting both individually and collectively, have demonstrated a decided preference for greater carriage than increased royalty payments or fair market compensation. Since 1992, the NAB (acting on behalf of broadcasters) has pursued market changes that significantly lowered payments into the cable royalty funds, in essence trading away royalties to achieve other priorities related to

the broadcasters' interests as distributors of programming. *See* Hazlett W.D.T. at 39. The Panel should consider this evidence of the broadcasters' perspective as copyright owners in the programming rights marketplace, just as it has done historically with respect to other claimants.

1. **Benefits From Distant Carriage**

300. Although it has been a consistent position of the NAB that (putting aside superstations) it do not receive increased advertising revenues from reaching distant subscribers, the record belies that statement. While Mr. Alexander denied that stations receive cash from advertisers for reaching distant subscribers, he did concede that a station's distant reach is something that its sales force touts in trying to make an advertising deal. *See* Tr. 2294-96 (Alexander). He admitted that such distant carriage might persuade an advertiser to purchase time on a station when they otherwise would not. *See* Tr. 2378 (Alexander). The clear implication of Mr. Alexander's testimony is that, while stations may not charge directly for reaching distant subscribers, they are able to use it as a negotiating tool that allows them to get a higher price from an advertiser than they otherwise would have gotten. Because of this, NAB members do stand to benefit from distant carriage and would have to take such benefit into account if they had to negotiate in the marketplace with cable operators.

301. Moreover, Mr. Alexander acknowledged that broadcasters are not totally indifferent to their carriage as a distant signal. *See* Tr. 2301 (Alexander). He noted that there were intangible benefits from carriage: increased visibility, prestige, distant subscriber familiarity with the station and credibility. *See* Tr. 2301-02 (Alexander).

2. **Support Of Rate Regulation**

302. The NAB's support for rate regulation – an example of the broadcasters acting collectively – demonstrates their willingness to accept less in royalties in the distant signal marketplace in return for greater benefits in the local marketplace. In the context of the implementation of the 1992 Cable Act, the NAB filed comments with the FCC supporting a methodology for regulating basic cable rates that would have resulted in an average basic tier cable rate of $4.50. *See* JSC Exhibit 2 at i. The NAB supported this average rate for the tier that would includes *all* televisions signals – distant or local – except for satellite-delivered superstations. *See id.* at 7-8. Accordingly, absent a cable system's self-defeating decision to put a superstation on a more expensive tier of service, the NAB was advocating rate regulation that would have reduced the royalty base for the cable compulsory license to $4.50 per subscriber per month. *See* 17 U.S.C. § 111(d)(1)(A). Given that the average revenue per subscriber per month was $ 16.17 at the time of the passage of the 1992 Cable Act, *see* Hazlett W.D.T. at 14, NAB's proposal would have slashed the cable royalty fund by more than 70%.

303. Although the NAB was unsuccessful in achieving its desired $4.50 rate structure, the FCC did create a rate regulation infrastructure that lowered broadcast tier basic cable rates substantially. *See* Hazlett W.D.T. at 14-15 (noting $3.15 drop in revenues per subscriber from 1992 to 1997). Indeed, Dr. Ducey recognized that rate regulation was a substantial reason for the decline in the royalty fund. *See* Tr. 1828-29 (Ducey); Tr. 1980-83 (Ducey) (noting that revenues relevant to royalty calculations decreased even as overall cable revenues went up).

304. The NAB's $4.50 rate proposal provides an objective and quantitative basis for what broadcasters were willing to accept in the marketplace for their programming. In

that proposal, they disclosed the level of royalties they were willing to accept for the distant retransmission of their copyrighted content in exchange for the benefits they accrued by being carried on a cheaper tier. *See* Hazlett W.D.T. at 37 (noting that broadcasters supported rate regulation "because they wanted to improve the relative position of broadcast programming vis-à-vis cable networks"); Tr. 1983 (Ducey) (broadcasters supported inclusion of all broadcast signals other than superstations on broadcast tier); Crandall W.R.T. at 10 (broadcasters support of $4.50 rate suggests that commercial broadcasters would be willing to accept substantially less than [the Rosston share] for the retransmission of their programming).

305. The Panel should adopt a royalty award for the NAB which accounts for their willingness to accept their share of a royalty fund based on an average revenues per subscriber per month of $4.50. At the time of the passage of 1992 Cable Act, the NAB was receiving royalties under the allocation made by the CRT in the 1989 Proceeding – 5.7%. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303. Had the 1998 cable royalty fund been based upon $4.50 per subscriber per month instead of $13.15 it would have 65.8% lower, or approximately $37.0 million.[60] Applying the NAB's then-expected 5.7% share to that reduced fund would yield a royalty award of $2.1 million to NAB, which is the amount of royalties that NAB were willing to accept in supporting rate regulation. Applying the $2.1 million award to the actual 1998 fund would yield a royalty share of 1.9%. That percentage represents what NAB would accept as a willing seller of its programming for royalties and for the benefits of carriage.

306. The following chart represents the range of possible results based on applying the quantitative measures of value to the size of the cable royalty fund had NAB obtained the desired $4.50 rate:

	Royalty Share	1998 Fund @ $4.50 Rate†	Royalties @ $4.50 Rate†	Actual Royalties†	NAB Willing Seller Share
1989 CRT Share	5.70%	$36.97	$2.11	$108.20	1.9%
1990-92 CARP Share	7.16%	$36.97	$2.65	$108.20	2.4%
Rosston Regression Share	10.93%	$36.97	$4.04	$108.20	3.7%
Bortz Survey Share	14.70%	$36.97	$5.43	$108.20	5.0%

† Figures are in millions of dollars.

3. **Support Of Must-Carry**

307. In addition to supporting rate regulation, NAB supported the must-carry rules implemented with the 1992 Cable Act. *See* Hazlett W.D.T. at 37; Tr. 10170 (Crandall); NAB Ex. 17-X at 309 (congressional testimony of NAB president supporting must-carry). As both Dr. Hazlett - calling on quantitative evidence - and Ms. Allen - calling on her experience - testified, the addition of the must-carry rules had the effect of forcing out distant signals, reducing the overall level of royalties in favor of broader local carriage of signals. *See* Hazlett W.D.T. at 16; Allen W.D.T. at 6-7.[61]

Footnote continued from previous page

[60] This total is calculated by first dividing $4.50 by $13.15, the average gross receipts per month in 1998-2. *See* Hazlett W.D.T. at 14 ($13.15 average). That ration is then applied to the total 1998 cable royalty fund of $108.2 million. *See id.* at 4 ($108.2 million fund).

[61] NAB offered an exhibit, NAB Ex. 16-X, that was intended to show that the must-carry and retransmission consent rules did *not* have the effect described by Dr. Hazlett. That exhibit showed that cable systems carried roughly the same number of distant signals in the second half of 1993 as in the second half of 1992, before the rules went into effect. While NAB Ex. 16-X misleading for the purpose NAB offered it, it actually demonstrates Dr. Hazlett's point.

Footnote continued on next page

308. While NAB engaged in substantial cross-examination in an attempt to rebut the point that must-carry rules had the effect of forcing out distant signals, it could have looked no further than its own case for support for Dr. Hazlett's and Ms. Allen's statements. The Rosston regression model contains a variable for the number of local signals carried by a cable system. When Dr. Rosston ran his regression analysis, he found that as the number of local stations increase, royalties decrease. *See* Rosston W.D.T. at 19 and Appendix C (coefficient for "Count of Local Channels").[62] That Dr. Rosston showed such a relationship is confirmation of the testimony of Dr. Hazlett and Ms. Allen.

4. **Redefinition Of Distant Signal**

309. In addition to supporting the substantive provisions of the 1992 Cable Act, broadcasters supported the expansion of the definition of "local" for the purposes of the Copyright Act. *See* Hazlett W.D.T. at 36-37; Tr. 2001-02 (Ducey) (describing support for change in definition of local as based on full implementation of must-carry rights). Through the 1994 Satellite Home Viewer Act, the definition of "local" was expanded to

---

Footnote continued from previous page

It is not surprising that the 1993-2 accounting period does not show a reduction in the average number of distant signals. That is because the must-carry and retransmission consent rules became effective *during the 1993-2 period*. *See* P.L. 102-385 § 6 (amending § 325 of 1934 Act, 47 U.S.C. § 325). If a cable system did drop a signal *during the period*, however, the Copyright Office's rules still required that cable system to report the carriage of that signal as a distant signal for the entire period. *See* Compulsory License for Cable Systems, 50 Fed. Reg. 9270, 9271 (Mar. 7, 1985); 1978 CRT Determination, 45 Fed. Reg. at 45270-71. Accordingly, the effect that Dr. Hazlett discusses would not reveal themselves until 1994. And, indeed, in NAB 16-X shows a more than 10% decrease in the number of distant signals carried in 1994-2.

[62] In Dr. Rosston's Greater-Than-Zero model, the coefficient for Count of Local Channels is not statistically significant, while it is statistically significant in Dr. Rosston's Greater-Than-Or-Equal-To-Zero model. Given than the real-world experience of Ms. Allen suggests that local, must-carry channels force out distant signals, Dr. Rosston's Greater-

Footnote continued on next page

include all communities within a broadcast station's Arbitration market designation, the Area of Dominant Influence ("ADI"). *See* Hazlett at 19 and n. 10. Such support is not surprising – Mr. Alexander testified that broadcasters are focused on their ADI's. *See* Tr. 2302 (Alexander).

310. Once again, the result of this legislative change benefited broadcasters at the expense of copyright owners collecting distant signal royalties. By reclassifying hundreds of signals as "local" rather than distant, this change allowed cable operators to stop paying royalties for those signals. *See* Hazlett W.D.T. at 19-20. The redefinition caused a measurable decline in the royalty fund. *See* NAB Ex. 12-X (showing decline in DSE's carried).

5. **Retransmission Consent**

311. Another portion of the 1992 Cable Act supported by the NAB was the retransmission consent provision. *See* NAB Ex. 17-X at 309 (expressing support for must-carry and retransmission consent). The retransmission consent provision of the 1992 Cable Act requires cable operators to obtain the consent of every commercial broadcast station that the system retransmits (local or distant), unless it is a satellite-delivered superstation. *See* 47 U.S.C. § 325. Thus, the retransmission consent provision gives commercial broadcast stations the right to negotiate with cable systems directly for carriage of distant signals – in effect, a free market for broadcasters while copyright owners are subject to the compulsory license.

Footnote continued from previous page
Than-Or-Equal-To-Zero model appears to predict the distant signal marketplace more accurately in this instance.

312. Despite their right to obtain compensation for carriage of distant signals from cable systems, broadcasters have largely failed to obtain any monetary consideration in the marketplace. *See* Hazlett W.D.T. at 17-18; Allen W.D.T. at 7-8 . As Mr. Alexander testified:

> And can you give us some idea of what those negotiations produced in terms of retransmission consent? Did payment change hands?
>
> THE WITNESS: As I recall, there's not a payment. There was no payment that happened during these years. It was carriage, basically, that was achieved, not much more than that, to my recollection.

Tr. 2298 (Alexander). Mr. Alexander's testimony is consistent with that of his would-be negotiating partner, Mr. Egan, who stated that:

> CVI consistently obtained retransmission consent from distant stations without paying any case compensation to those stations. In my experience, these stations were generally more interested in carriage than compensation.

Egan W.D.T. at 6 n.2.

313. The inability of broadcasters to negotiate substantial compensation in the retransmission consent marketplace reveals a unique glimpse into their "seller's perspective." In the retransmission consent marketplace, with the exception of WGN, the broadcasters are negotiating compensation over the same rights (to retransmit distant signal programming) with the same parties (cable operators) in a marketplace where the broadcasters are not compelled to give their consent – essentially the marketplace the Panel must replicate. The lack of compensation received by broadcasters in those negotiations indicate that broadcasters would be willing to sell their programming at a low price to ensure its carriage, and that cable operators would find the market price for the broadcasters' programming lower than they would be willing to spend to acquire it.

6. **Support For Compulsory License**

314. Perhaps one of the most revealing positions taken by the NAB on behalf of broadcasters is the NAB's support of the compulsory license. During the pendency of the 1992 Cable Act, NAB lobbied Congress (in the form of the testimony of NAB President Eddie Fritts) *against* the repeal of the compulsory license. *See* JSC Ex. 6-R. Dr. Crandall found that position to be particularly indicative of the broadcasters' seller's perspective:

> Well, if in fact the broadcasters want to continue this system but other claimants, such as the Sports Claimants or perhaps the motion picture companies do not, would suggest to me as an economist that the latter think that they can obtain much higher rates or better compensation in the absence of the compulsory copyright system despite the transactions cost and would prefer that system. Whereas, apparently the NAB does not think that that would be the case for them.

Tr. 10256-67 (Crandall). Accordingly, whereas the JSC members would expect much more compensation a free market absent a compulsory license, the broadcasters have demonstrated that they believe they could fair no better in a marketplace absent the compulsory license.

F. **Changed Circumstances**

315. The record has demonstrated no changed circumstances that indicate that the relative marketplace value of NAB programming has increased. Indeed, the only evidence that appears to form a set of "changed circumstances" is NAB's aforementioned conduct in support of numerous legislative and regulatory initiatives that have severely reduced the royalty fund in favor of the broadcasters' concerns as programming *distributors* rather than owners.

1. **WTBS Conversion And WWOR Removal From Satellite**

316. Despite the NAB's concentration on the WTBS conversion as a significant changed circumstance that benefits its claim, the NAB has failed to show that the WTBS conversion has made its programming relatively more valuable. The NAB had a meaningful share of programming on WTBS – approximately 6.2% according to NAB Ex. 6. This share exceeded that of the JSC, which accounted 5.2% of the programming on WTBS. *See* NAB Ex. 6. Like the other claimants who had programming on WTBS, NAB considered its programming on WTBS to be a valuable part of its claim in prior proceedings, and sought an award based in part on that value. *See* Tr. 1963-64 (Ducey); 1990-92 Ducey W.D.T. at 17-18 (D3:16). Indeed, because there was little news and public affairs programming on WTBS in 1992, *see* JSC Ex. 10-X, the NAB programming on WTBS tended to be programs "of broad appeal, not limited to matters of interest only in the Atlanta market," and programs that were intended to "appeal to distant cable subscribers," 1990-92 Ducey W.D.T. at 18.

317. Whereas the NAB now trumpets the fall of WTBS, it was able to increase its share during the rise of WTBS. As Dr. Ducey testified, his arguments in this proceeding concerning the WTBS conversion would possibly have supported a *decline* in the NAB share from 1978 to 1990-92. *See* Tr. 1972 (Ducey). Instead, however, the NAB's royalty share increased. *See id.* This increase was not at the expense of claimants that did not have programming on WTBS, however – NAB's increasing share from 3.5% in 1978 to 7.1625% in 1990-92 was largely the result of taking royalties from the Program Suppliers, whom NAB now contends warrant the largest share decrease based on the WTBS conversion.

318. Lost in NAB's direct case (and rebuttal case for that matter) is the loss of WWOR as a superstation. *See* Tr. 1966 (Ducey) (noting that he did not mention WWOR in testimony concerning changes to the distant signal marketplace). While WWOR did not receive the same wide distribution as WTBS, it did account for 467 instances of carriage in 1992 as the third largest superstation. *See* 1990-92 Lemieux W.D.T. at 10 (D5:36). NAB programming accounted for more than 12% of WWOR's programming hours. *See* JSC Ex. 7-X; Tr. 1966 (Ducey) (stating that "a lot" of NAB programming was "lost" when WWOR ceased to be a superstation). The NAB prominently featured its WWOR non-news programming in both the 1989 Proceeding and the 1990-92 Proceeding, including talk shows such as the "Joe Franklin Show." *See* 1989 Ducey W.D.T. at 10-11 (D2:9); 1990-92 Ducey W.D.T. at 20-21.

319. The NAB programming on WTBS and WWOR formed a significant portion of the NAB's programming volume in 1992. According to Dr. Fratrik's database, fully 37% of the NAB's weighted distant signal programming time in the 1992 Proceeding was WWOR and WTBS programming. NAB thus claims substantially less programming and substantially less valuable programming in the 1998-99 Proceeding that it did in the 1990-92 Proceeding. *See* Tr. 1965-66 (Ducey) (asking for an increase in the *absolute dollar* amount of NAB's royalty claim despite loss of WTBS programming).

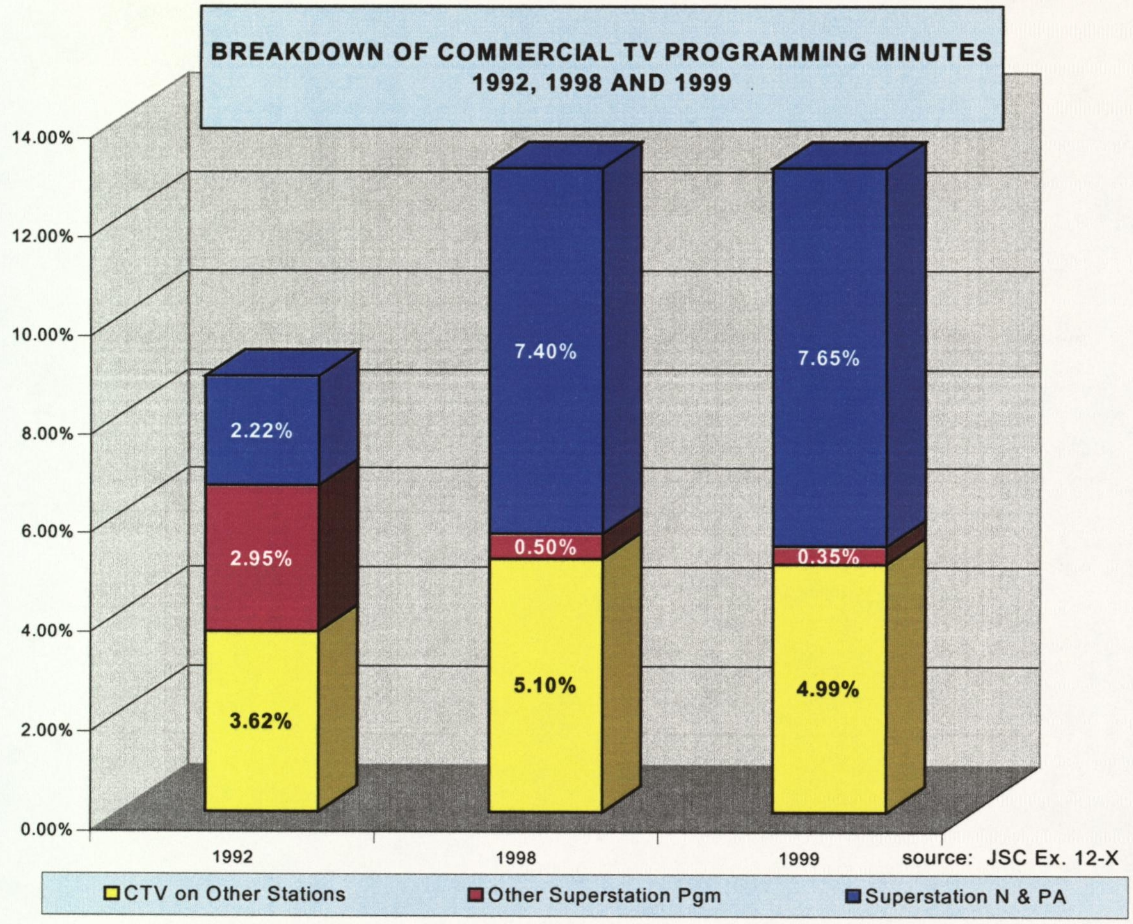
2. **<u>Reduction In Carriage Of Network Affiliates</u>**

320. In addition to the loss of the programming on WTBS and WWOR, a substantial amount of NAB programming was eliminated by the decline in the number of network affiliates carried as distant signals. The NAB programming on network affiliates has always been an important part of the NAB's claim. *See* Tr. 1974 (Ducey). As shown in the testimony of Dr. Hazlett, instances of carriage of network affiliates have dropped

from 1,582 instances in 1992 to approximately 1,225 in 1998. *See* Hazlett W.D.T. at Appendix D; *see also* Tr. 5451-52 (Bennett) (discussing "dramatic" drop in carriage of network affiliates). Those numbers, however, do not tell the whole story; over 40% of the instances of carriage in 1998 were *partially* distant instances of carriage. *See* Hazlett W.D.T. at Appendix D.

3. **Shift Towards Superstation News & Public Affairs**

321. One of the results of the WTBS conversion and WWOR loss of superstation status is that the makeup of the NAB category has shifted dramatically towards superstation news and public affairs programming, which the CRT traditionally accorded little or no value. A closer analysis of the Fratrik time study revealed that the increase in the NAB's share of distant signal programming time from 1992 to 1998 was attributable to the superstation news and public affairs programming. As shown in the chart below, while the NAB's share of distant signal programming increases from 8.8% in 1992 to 13.0% in 1998, the entire increase was attributable to the higher level superstation news and public affairs programming. Indeed, the total amount of "general" interest superstation programming and non-superstation NAB programming – programming which Dr. Ducey highlighted in his 1990-92 testimony as highly valuable to NAB's claim– actually declined from 1992 to 1998-99:



This shift in programming indicates that the aggregate (relative) volume increase in the NAB category is misleading. As superstation news and public affairs programming has little or no value outside its region, *see* 1989 CRT Determination, 57 Fed. Reg. at 15302, the in-bulk addition of that programming adds nothing to NAB's claim. Indeed, the CRT specifically held in the 1980 Proceeding that an increase in time devoted to news programs was not "of decisional significance" to justify and increase in the NAB's award. *See* 1980 CRT Determination, 48 Fed. Reg. at 9565.

4. **<u>Growth Of Regional News Networks</u>**

322. One changed circumstance that tends to dilute the value of NAB's claim is the rise of regional cable news networks. Whereas as substantial number of RSN's existed

in 1992, *see* 1990-92 PS Ex. 6-R (R2:2), regional news networks grew substantially in numbers during the 1990's to a number similar to that of RSN's, *see* Tr. 8993 (Ducey). As Mr. Alexander testified, these regional news networks are a direct competitor with the newscasts on broadcast television, and that broadcasters are responding to in the marketplace. *See* Tr. 2333-35 (Alexander).

G. **Recommended Award**

323. The NAB requested an award of 14.5% of the royalties. Such an award would total $3 million per year more than what the NAB received in the 1990-92 Proceeding. *See* Tr. 1958-59 (Ducey). NAB seeks this increase notwithstanding that:

* the cable royalty fund has declined significantly – in large part because of the actions the NAB has taken to support legislation and regulation that has reduced the cable royalty fund;

* between 1992 and 1998, NAB has demonstrated in the marketplace that it is willing to accept little or no compensation for the carriage of its programming;

* NAB had substantial programming on the two superstations that lost their status between 1992 and 1998 and that an important source of NAB programming, network affiliates, suffered a substantial decline in carriage;

* The programming mix in the NAB category has shifted substantially toward the type of programming that the CRT has found to be of little or no value to cable operators.

324. Instead of NAB's 14.5% claim, the Panel's award to NAB should be tied to the $4.50 per month cable rate it recommended during the implementation of cable rate regulation as a reflection of its seller's perspective. In making its $4.50 per month recommendation to the FCC, the NAB revealed its willingness to accept low royalties for the benefits it obtains from carriage by cable systems under the rules for which the NAB lobbied.

325. The Panel should begin with NAB's Bortz survey shares, and then apply those shares to the dollar amount the royalty fund would have been were the $4.50 rate adopted, and then apply that dollar award against the actual 1998 and 1999 royaltes. Using this methodology, NAB would receive an award of **5.0%** in 1998 and **5.1%** in 1999.

III. PTV BASIC FUND AWARD

A. Nature of PTV Claim

326. During 1998 and 1999, there were approximately 350 non-commercial television stations, *see* Wilson W.D.T. at 6, of which approximately 180 were retransmitted on a distant signal basis by one or more cable systems. *See* Whitt W.R.T. at 8. PTV's claim consists of all programming on the distantly retransmitted non-commercial television stations. *See* Wilson W.D.T. at 7 n. 2. Most of this programming was part of PBS' National Programming Service or syndicated programming services. PBS made available approximately 2,000 hours of original programming (which generally could be televised by PBS member stations more than once) *See id.* at 17 n.6. Individual stations also acquired some programming from independent programmers outside PBS, and they produced some of their own programming. *See* Tr. 3002-03 (Wilson).

B. Value of PTV Programming As Reflected in the Bortz Study

327. As discussed above, the unadjusted results of the Bortz survey show a valuation of 2.9% for PTV in both 1998 and 1999. Mr. Trautman's adjustment for PTV-only and Canadian-only systems brings the PTV share to 3.5% in both years. These allocations represent the best measure of the relative marketplace value for PTV programming. For the reasons discussed above, the Fairley adjustments, which

significantly increase the PTV share in the Bortz survey, are inappropriate and should not be made.

C. PTV Shares In Other Quantitative Studies

1. Rosston Study

328. Dr. Rosston's Greater-Than-Zero regression analysis produces a share for PTV of 7.54% for the combined years of 1998 and 1999, *see* Rosston W.D.T. at 23, with shares of 8.69% in 1998 and 6.29% in 1999 when the regression analyses are performed separately. *See* Crandall W.R.T. at Appendix 3. Dr. Rosston's Greater-Than-Or-Equal-To-One regression analysis produces a share for PTV of 5.75% for the combined years of 1998 and 1999, *see* JSC Ex. 14-X, with shares of 6.65% in 1998 and 4.81% in 1999 when the regression analyses are performed separately. *See* Crandall W.R.T. at Appendix 4.

329. During Dr. Rosston's cross-examination, counsel for PTV calculated the high end of the confidence interval for the PTV share in the Greater-Than-Zero regression analysis as 10.47% (1998 and 1999 combined). *See* Tr. 2869-2874 (Rosston). The same methodology shows that the low end of the confidence interval for PTV is 4.38%, which is close to, and within the confidence interval surrounding, the 3.4% PTV valuation in the Bortz study, as adjusted for the PTV-only and Canadian-only systems. *See* JSC Ex. 1 at 54-55 (showing a 1 percentage point confidence interval surrounding the PTV valuation). The low end of the confidence interval for the Greater-Than-Or-Equal-To-One regression model actually reaches the level of the *unadjusted* Bortz survey share for PTV – it would calculate to be 2.93%.

330. And, in fact, there may be good reason for the Panel to use the lower end of the confidence interval for PTV. As Dr. Rosston admitted, he did not adjust the programming minutes on each cable system for the fact that a signal may be partially

distant. *See* Tr. 2636-38 (Rosston). Because over 30% of PTV instances of carriage are partially distant instances, *see* Hazlett W.D.T. at Appendix D, Dr. Rosston's methodology favored PTV quite a bit. Dr. Johnson agreed that over 20% of the programming minutes in Dr. Rosston's study were PTV minutes, *see* Tr. 9225 (Johnson) which was substantially higher than the figure in his adjusted subscriber instances calculation (14+%), *see* Johnson W.R.T. at 7, or in Dr. Fratrik's time study (14%), *see* NAB Ex. 10 at 13. Because Dr. Rosston's coefficients were applied to unweighted minutes in his analysis to produce "total value," PTV was substantially benefited by Dr. Rosston's failure to weight programming minutes by the number of distant subscribers on a cable system.

2. **Nielsen Study**

331. The Nielsen viewing study shows that People Meter households spent approximately 16.9% of their distant signal viewing time in 1998, and 15.9% in 1999, tuned to PTV programming. The comparable numbers for 2+ demographic viewing shares were 16.5% and 16.8% in 1998 and 1999, respectively. *See* PS Exs. 20 and 22. These shares are significantly higher than the 2%-4% viewing share that PTV received in the 1991 and 1992 Nielsen full-year studies. *See* 1990-92 CARP Report at 121.[63]

332. The difference in viewing shares may be explained in large part by the fact that Nielsen included significantly more quarter-hours of PTV programming in the 1998-99 studies than in the 1991-92 studies. In the 1991 and 1992 Nielsen full-year studies, PBS programming time accounted for approximately 23% of the total programming quarter hours. *See* 1990-92 Lindstrom W.D.T. at 14 (Designated by Program Suppliers).

[63] The CARP noted that it was undisputed that the 1991 viewing time was substantially incomplete for PTV. *See* 1990-92 CARP Report at 121.

However, the PTV category accounts for almost 30% of the quarter-hours of programming in both 1998 and 1999. *See* PS Exs. 20 & 22. That 30% share far exceeds PTV's weighted share of distant signal programming time as measured by the Fratrik time study. *See* NAB Ex. 10 at 13 (showing 14.8% share of distant signal programming time for PTV).

333. The substantial importance of programming time rather actual viewing time in accounting for PTV's distant signal viewing share leads to the lowest avidity factor in the Gruen analysis. When he calculated it in the context of his rebuttal testimony, Dr. Gruen showed that PTV programming had a "viewing minutes per quarter hour factor" of 1.24 in 1998 among the 2+ demographic, higher only than devotional programming and 1/15th that of sports. Accordingly, the use of the "full avidity" factor results in an adjusted viewing share of 5.3% for PTV in 1998 among the 2+ demographic. *See* Gruen W.D.T. at 42-43. In 1999, the same methodology reduces PTV's viewing share to 6.0%.

3. **Fratrik and Johnson Time Studies**

334. As discussed above, neither the Fratrik nor the Johnson time studies provides a valid measure of relative market value. However, because they employ essentially the same approach, the Fratrik time study and Johnson rebuttal time study accord PTV essentially the same shares for 1998 and 1999. Dr. Johnson's study estimates PTV adjusted subscriber instances at 14.1% and 14.7% in 1998 and 1999, respectively, *see* Johnson W.R..T. at 7, while Dr. Fratrik's study estimates the PTV share of distant signal programming time to be 13.93%, *see* NAB Ex. 10 at 13.

335. While PTV's share of time in 1998-99 is higher than in 1990-92, it is not significantly different than it was in years when PTV's cable royalty award was first established. In the 1978 Proceeding, for example, PTV introduced evidence that PTV

programming accounted for 11-12% of all distant signal programming time, but the CRT awarded PTV only 5.25% of the royalties (essentially the same amount as the fees that PTV generated). *See* 45 Fed Reg. at 63030, 63038. In 1979, PTV supported the NAB time study, which showed that PTV programming accounted for 13% of the programming time on distant signals. *See* 1979 CRT Determination, 47 Fed. Reg. at 9885. Despite this share – which is nearly identical to the PTV share in the Fratrik time study, *see* NAB Ex. 10 at 13 – PTV was awarded 5.25% in the 1979 Proceeding. *See id.* at 9567.

C. Additional Evidence Concerning The Value Of PTV Programming

1. Limited Carriage

336. PTV stations receive only limited carriage as *distant* signals. Approximately three out of every four cable systems do not import any PTV distant signals. *See* Fuller W.D.T. at 3 (noting that 23% of cable systems carried a distant PTV signal). For those systems, all the PTV programming they need is local. Indeed, according to PTV Exhibit 16, only a little more than 4% of cable subscribers overall receive a distant PTV signal as their first PTV signal, meaning that for the more than 95% remaining cable subscribers, the importation of a distant signal would simply represent some amount of duplicative programming. The limited need for the importation of the distant PTV signals is demonstrated by the extensiveness of the PBS network; Mr. Fuller testified that there are 342 PTV stations in the 50 states. *See* Tr. 3303 (Fuller). These numbers do not match the fees-generated by Dr. Johnson in his direct testimony, however, given that in both his calculations (Tables 1 and 8) include minimum fee royalties. *See* Tr. 3734 (Johnson) ("These figures [in Table 1] reflect an allocation equally to all of the local stations in the relevant cable market."); Tr. 3737-41 (Johnson) (discussing minimum fee allocations present in Table 8).

337. In many ways, the limited carriage of PTV signals is comparable to the carriage of Fox stations as distant signals. As with PTV signals, it is likely that every cable operator would want to carry at least one Fox station. *See* Tr. 3505 (Fuller) ("I mean, how can you run a business and leave out the major networks."); Tr. 3564-65 (Fuller) (including Fox network in that statement). Mr. Fuller agreed that, like PTV programming, it would be important to bring in the NFL, MLB and NHL programming on Fox into communities that did not have a local Fox affiliate. *See* Tr. 3565-66 (Fuller). As identified above in paragraphs 274-275, the carriage of Fox distant signals is roughly half that of PTV signals. However, in considering such carriage, it must be remembered that Fox stations are counted as independent stations that "cost" a full DSE, while PTV signals "cost" only 0.25 DSE. Accordingly, on a royalty basis, the cost of carriage of half as many Fox distant signals would likely be equal to or exceed the cost of carrying all of the PTV distant signals. Because of the similarities in carriage, it is logical that any award for PTV based on its level of carriage would be roughly equal to award for the programming on Fox signals.

2. **<u>Fee Generation</u>**

338. The testimony of Mr. Trautman and Ms. Martin agreed that PTV signals generated for 3.3-3.4% of the cable royalty fund according to the Cable Data Corporation ("CDC") methodology. *See* Martin W.D.T. at 9; Trautman W.R.T. at 5. The 3.4% fees-generated number for PTV as calculated by Mr. Trautman in his rebuttal testimony is essentially the same as his adjustment second, non-fees generated adjustment to the Bortz survey – indicating the high correlation between how cable operators value PTV distant signals and what they pay for those signals. *Compare* Trautman W.R.T. at 5 *with id.* at 8.

339. There is a great deal of inequity involved in allocating PTV more than its fee generated share of its royalties. As David Bennett stated, the royalties paid to PTV in excess of their fee-generated share come out of the royalties generated by the carriage of other signals. *See* Tr. 5374 (Bennett). In fact, as Dr. Johnson conceded, were the Panel to conclude that PTV should get more than its fee-generated share , that would mean that one or more other claimants would be forced to receive *less* that what cable operators paid to carry their programming. *See* Tr. 9141 (Johnson).

340. While PTV has consistently employed hypotheticals involving signals A, B, and C to demonstrate the *theoretical* point that it is possible for a claimant to be entitled to more than its fee-generated share of royalties (*see* PTV Ex. 10-X), Mr. Bennett put it succinctly: "to the best of my knowledge . . . nobody's ever presented convincing evidence that that one signal type [is] consistently the A or the B or the C." Therein lies the problem with PTV's resistance to the fee-generated methodology. PTV may have shown, on the whiteboards of the CARP room, that it might *theoretically* be entitled to more than its fee generated share of royalties. But it has failed to adduce any hard evidence that cable operators in fact value PTV signals more in relation to what cable operators pay for them than the other signals they carry. The record evidence is to the contrary.

341. The Panel can look to the Bortz survey as substantial proof that cable operators *do not* value PTV more in relation to what they pay for it than other kinds of signals. The Bortz survey, as discussed above, asks cable operators to engage in the very exercise that PTV's hypotheticals attempt to describe by having cable operators allocate a fixed budget among different programming categories. If, as PTV's hypotheticals predict,

PTV were valued relatively more by cable systems than other types of programming, one would expect that the Bortz survey results would show an allocation to PTV that substantially exceeded PTV's fee-generated share. However, as noted above, the results of these surveys show that, in the aggregate, the value assigned to the PTV category is roughly equal to the fees generated by PTV signals. Indeed, when the Bortz survey results are adjusted to account for PTV-only systems, the result is identical to the share generated by the pure fees-generated approach. Accordingly, in contrast to PTV's mere *hypothetical* evidence of PTV being valued disproportionately to the royalties paid for PTV signals, the Bortz survey provides hard, quantitative proof that PTV does not have such disproportionate value.

342. In addition, as discussed above at paragraph 215, were Dr. Johnson's "parity" theory to hold true, one would expect that PTV's share of value in the Rosston regression analyses would at least approach PTV's share of the total minutes studied by Dr. Rosston. However, the coefficients produced by that study show that the "price" of an additional PTV minute is at a 60+% discount to an additional minute of programming from the Program Suppliers and Commercial Television, and a 95% discount to an additional minute of sports programming. *See* Rosston W.D.T. at 19. The results of the analyses (using either Greater-Than-Zero or Greater-Than-Or-Equal-To-One model) confirm this substantial discount to the amount of programming time that PTV accounts for in the study. *See id.* at 23; JSC Ex. 14-X.

343. There are passages in prior cable royalty distribution decisions where the CRT or the prior CARP disavowed fee generation. Nevertheless, both the CRT and the prior CARP recognized that the fee-generated approach has a role in distribution

proceedings involving the compulsory licenses. As an initial matter, the 3.75% fund is itself a creation of the fees-generated methodology. PTV does not participate in the 3.75% fund because PTV signals cannot be carried as 3.75% signals – meaning that PTV cannot collect royalties it does not generate. *See* 1983 CRT Determination, 51 Fed. Reg. at 12807-08. The CRT recognized that the exclusion of PTV from the 3.75% royalties was a fee-generated approach, but nevertheless adopted it over PTV's objection. *See id.*

344. In addition, the CARP in the 1990-92 Proceeding also adopted a fees-generated approach in awarding royalties to the Canadian Claimants. *See* 1990-92 CARP Report at 140-41. However, the failing of the CARP was not its use of the fee-generated methodology, but that it did not employ the methodology consistently. While the CARP awarded PTV two and a half times its fees-generated share, *see* 1990-92 Librarian Determination, 61 Fed. Reg. at 55663, the Canadian Claimants were limited to their fees-generated share as adjusted by the Ringold survey. *See* 1990-92 CARP Report at 140-41.

345. The fee-generation approach is more practical in application than PTV would suggest. As demonstrated by Mr. Bennett, calculation of the fees generated by particular signals can be made within a range. *See* Bennett W.R.T. at 2-3. Moreover, the use of the methodology developed by Cable Data Corporation ("CDC") involves the equal allocation of royalties among signals *pro rata* according to their DSE values, thereby eliminating the skewing effect of the sliding scale of royalty rates. *See* Tr. 5342-43 (Bennett). The CDC methodology results in a value somewhere between the maximum and minimum fee generation for the particular signal. *See* Tr. 5347 (Bennett). As such, not only does the fee-generated methodology treat the royalties generated by PTV and Canadian signals equitably, it is feasible in its application.

3. **Programming Expenditures**

346. PTV itself has suggested that the amounts spent by individual stations to acquire or to produce PTV programming are a good indicator of the market value of that programming. *See, e.g.,* Wilson W.R.T. at 6 (stating that PTV stations spent approximately $772 million on programming in 1999). That amount, however, represents only a small portion of the amounts that are spent for commercial broadcast programming. Dr. Schink testified that broadcast stations paid program syndicators alone $4 billion in the 1998-99 time period, not including the network expenditures of the Fox, WB, and UPN networks. *See* Tr. 8755-56 (Schink). Moreover, his calculation of a 2.14% music-license-fee to non-network programming was based on overall non-network programming expenditures of $7.6 billion. *See* Tr. 8772 (Schink) ($163 million license fee as 2.14% of non-network programming expenses). As this suggests, one of the measures that PTV itself uses to establish market value shows that its programming has a significantly lower market value than commercial network programming.

347. The above data also disprove PTV's 'parity' theory. On a per-station basis, the $4 billion paid to syndicators by commercial stations alone amounted to $3.28 million per station in programming expenses. *See* JSC Ex. 60-RX (FCC broadcast station totals showing 1220 commercial television stations). The total $7.6 billion in total non-network programming figure cited by Dr. Schink equals $6.24 million per station. Both of these numbers outstrip PTV's average programming expenditure of $2.2 million per station (the $774 million cited by Mr. Wilson divided by 350 PTV stations). In fact, the record shows that the Fox network pays about as much per station for the rights to NFL programming - $2.25 million - as PTV pays for all of its programming. *See* Tagliabue W.D.T. at 4 ($550 million in rights fees paid by Fox); Tr. 8785 (200 Fox affiliates).

4. **Duplication**

348. As reflected in PTV Exhibit 16, only about 28% of the subscribers who receive a distant PTV signal (4% of all cable subscribers) do not have access to a local PTV signal. Thus, the vast majority (72%) of cable subscribers receiving a distant PTV signal receive that signal in addition to one or more local PTV signals. Because 50-60% of the programming of a PTV station is delivered by the NPS, *see* Tr. 2999 (Wilson), a cable subscriber receiving more than one PTV distant signal will be receiving a substantial amount of duplicate programming. Such duplication would be especially pervasive in prime time, where PTV stations operate under a common carriage agreement that requires them to carry programs during primetime on the nights they are fed by the NPS. *See* Tr. 3000-01 (Wilson). That common carriage agreement did not exist in 1990-92.

349. Mr. Fuller looked at a small amount of programming on handful of non-randomly selected stations and found that duplication was not significantly different than in his prior studies of limited periods on a handful of different non-randomly selected stations. As Mr. Fuller recognized, his studies are non-scientific and cannot be projected to the universe of PTV stations carried as distant signals or to all time periods. *See* Tr. 3569-70 (Fuller). Additionally, Mr. Fuller admits that he did not take into account duplication that results from an identical show being shown on multiple occasions (albeit at different times) by the PTV stations he studied. *See* Tr. 3570-85 (Fuller).

D. **<u>The Seller's Perspective</u>**

350. As with the NAB, consideration of the seller's perspective is a substantial basis to reduce the award of PTV. Like NAB, PTV stations are motivated by carriage rather than compensation, and PTV's support of must-carry is also inconsistent with an effort to maximize royalties under the compulsory license.

351. Mr. Wilson testified that the amount of harm suffered is one thing that PTV would take into consideration when negotiating in the marketplace absent the compulsory license. *See* Tr. 9557-58 (Wilson). However, he then conceded that PTV does not consider itself harmed when a PTV station is imported into a community with no local PTV signal. *See* Tr. 9565. One of the main tenets of PTV is that it should be available in every household. *See* Tr. 9584 (Wilson). The goal of universal public television service is met when a PTV signal is carried into a community with no local PTV signal. *See* Tr. 9585 (Wilson). Mr. Wilson testified that a PTV signal would actually want to be carried into those communities where no local signal is present. *See id.* Accordingly, while Mr. Fuller testified that those systems that do not carry a local PTV signal might place the highest value on those PTV signals, *see* Fuller W.D.T. at 3-4, those are exactly the cable systems that PTV would be most willing to allow to carry a PTV signal. As Mr. Wilson testified, the principle of public access to PTV stations is more important than compensation for the carriage of those stations. *See* Tr. 9587 (Wilson). Therefore, taking the seller's perspective into account, in those instances in which PTV was carried as a distant signal and where the cable system had no access to a local PTV signal, it is likely that PTV would demand little or no compensation for such carriage. This fact alone is significant enough to warrant a substantial deduction from PTV's Bortz survey share to account for "seller's perspective" considerations.

352. PTV's position on retransmission consent also reinforces the notion that, in the marketplace absent the compulsory license, PTV would demand little or no compensation for carriage of its signals and programming. When the possibility of retransmission consent for PTV signals was raised in the context of the 1992 Cable Act, PTV submitted testimony in opposition to the concept of retransmission consent. *See* JSC Ex. 57-RX (Statement of Mr. Becton). Mr. Becton, WGBH's general manager, speaking on behalf of the PTV community, stated that:

> We recognize that re-transmission consent offers some public television stations the opportunity to obtain new and much needed resources from the nation's cable systems. And, in this time of budgetary restraint and severe cutbacks, such an idea is more than a little inviting. . . .
>
> But it should not be left to individual stations to trade the principle of universal access for another revenue source.

JSC Ex. 57-RX at 836. Accordingly, PTV's stated preference is for *carriage* of their signals rather than any compensation for the carriage of PTV's signals.

353. Indeed, PTV's main concern in pressing for the renewal of the must-carry rules in the context of the 1992 Cable Act was that its goal of universal access would be set back without the ability to compel cable systems to carry its signals. Mr. Becton, speaking on behalf of the PTV community, stated that close to 100 PTV stations found themselves dropped by cable systems in the 1980's when the must-carry rules were eliminated. *See* JSC Ex. 57-RX at 835. This testimony indicates that, in the absence of must-carry rules, PTV's distant signal carriage would be significantly less than it is today, and that it is likely that a substantial number of the partially distant instances of PTV carriage are due to the must-carry rules, rather than any value placed by cable operators on the importation of duplicative PTV signals. In the absence of a compulsory license, it

would be difficult to imagine PTV obtaining compensation for carriage of such signals, if the signal were carried at all.

E. **Changed Circumstances**

354. There are a number of changed circumstances with regard to the relative marketplace value of PTV programming. Not all are positive for PTV; there is significant evidence of the decline in the value of PTV distant signals and PTV distant signal programming.

1. **Decline in PTV's Internal Measures of Success**

355. Between 1992 and 1998, the measures that PTV considers important as a benchmark for PTV's performance suffered a decline. The measure of cumulative viewing on a monthly basis – a measure of how many unique individuals are "using" PTV – is a "very important statistic to [PTV]." Tr. 3210-11 (Wilson); *see also* However, PTV experienced a decline in that "very important" measure: whereas over 80% of Americans tuned into PTV programming at least once monthly in 1992, only about 70% did so in 1998. *See* Tr 3211-14 (Wilson). This decline in cumulative viewing is consistent with PTV's overall decline in ratings since 1992 from 2.0 to 1.7. *See* Tr. 3083-86 (Wilson). Accordingly, the use of PTV, under PTV's preferred measurement of that use, showed a significant decline from 1992 to 1998.

356. Similarly, PTV experienced a decline in the number of contributions during the 1992 to 1998 period. Mr. Wilson testified that the voluntary contributions by PTV viewers show the avidity of their interest for PTV. *See* Wilson W.D.T. at 5. However, the total number of households contributing to PBS dropped from 5.2 million in 1990 to 4.6 million in 1998. *See* Tr. 3197-98 (Wilson). This decline was experienced despite the fact that the total number of households increased by 8 to 10 million during those years. *See*

Tr. 3198-99 (Wilson). Thus, under PTV's own metric, avidity for PTV declined significantly during the 1990's.

357. Finally, in the context of the 1990-92 Proceeding, PTV set forth evidence that PBS's expenditures on programming far exceeded that of several "look-alike" cable networks in an effort to demonstrate the value of PBS programming. *See* 1990-92 Lawson W.D.T. at 29 (R2:7). However, as Mr. Wilson admitted, he was aware that the various "look-alike" networks had substantially closed the gap between their expenditures for programming and the programming expenditures by PBS. *See* Tr. 3179-81 (Wilson).

2. <u>Decline in Full-Time Carriage</u>

358. Even though no PTV signals were converted into cable networks (a la WTBS) or removed from their satellite positions (a la WWOR), PTV suffered an absolute decline in full-time distant signal carriage. Dr. Hazlett's testimony shows that fully distant PTV instances of carriage dropped from 430 instances in 1992 to 398 in 1998 and 412 in 1999. *See* Hazlett W.D.T. at Appendix D. On the basis of *systems*, the number of systems carrying PTV as a fully distant signal decreased as well, from 395 in 1992 to 370 in 1998 and 389 in 1999. *See* Tr. 3536 (Fuller). Accordingly the only increase in the carriage of PTV signals resulted from the aforementioned increase in the number of *partially* distant signals. *See* Tr. 3536 (Fuller).

3. <u>Decline in "Most Valuable" Type Of Carriage</u>

359. As in past proceedings, PTV put on evidence that the most valuable type of carriage of a PTV distant signal is when that signal is carried to subscribers who have no access to a local signal. *See* Fuller W.D.T. at 3-4. However, the level of such "distant-only" PTV carriage has dropped from the 1990-92 time period. As Mr. Fuller testified, the percentage of cable systems falling into the category of "most valuable" PTV carriage

declined from 52.6% to 49.5%. *See* Tr. 3543-44 (Fuller). Conversely, the percentage of systems importing duplicative signals increased. *See id.*

4. **Lack of Significant Programming Changes**

360. Unlike in the 1990-92 Proceeding, PTV is not in a position to trumpet 1998 and 1999 as "watershed" years for PTV. Tr. 3163 (Wilson). The CARP in the 1990-92 Proceeding recognized the new programming initiatives of PBS and credited those efforts in increasing PTV's award from the CRT's 1989 award. *See* 1990-92 CARP Report at 123 (referring to new programming and promotional initiatives). The years 1990-92 were "watershed" years because of the initiation of the NPS and the creation of a Chief Programming Executive model of decisionmaking. *See* Tr. 3161-62 (Wilson). However, as Mr. Wilson admitted, PTV engaged in no such new programming initiatives in the 1998-99 period. *See* Tr. 3162-63 (Wilson). He indicated that while 1998-99 were "important" years, they were not "watershed" years. *See* Tr. 3163 (Wilson).

5. **Increased Competition from Cable Networks**

361. As PS Ex. 24-X amply demonstrates, no broadcast network was the subject of as much competition from cable networks in the late 1990's. In addition to the increased spending of PTV "look-alikes" which closed the gap in program spending from the 1992 period, *see* Tr. 3179-80 (Wilson), the 1990's showed a proliferation of networks specializing on children's programming, *see* Tr. 2265 (Alexander).

362. Indeed, PTV has recognized the "fiercely" competitive environment in which it operates. *See* Tr. 3123 (Wilson). In this environment, other cable networks are beginning to be associated with the attributes once assigned solely to PTV. *See* Tr. 3127-28 (Wilson). As such, the increased competition from cable networks is causing the "uniqueness" of PTV programming to become a thing of the past. Indeed, PTV has

suffered a 23% decrease in ratings over the course of the 1990's. *See* Tr. 3138 (Wilson). It seems likely that competition from "look-alikes" and other cable networks are substantially decreasing the usefulness and value of PTV programming.

6. <u>TBS Conversion</u>

363. While it is impossible to deny that PTV had no programming on WTBS before it converted to a cable network, the WTBS conversion on its own does not support a large increase for PTV's share, and does not outweigh the other indicia of the declining value of PTV.

364. According to Dr. Johnson, an adjustment for the conversion of WTBS into a cable network would result in a minor increase in the PTV. As he testified, an increase in PTV's share to 7.0% in 1998 and 6.7% in 1999 would leave PTV in the same position it would have been in dollar-wise had WTBS not converted. *See* Tr. 3664 (Johnson). The other methodologies employed by Dr. Johnson to account for "other factors," *see id.*, are thus not necessary to account for the change in circumstances caused by the WTBS conversion.

365. However, it would be overly simplistic for PTV to assume that it had no stake in the royalties attributable to the carriage of WTBS as a distant signal. As Dr. Hazlett testified, the 1990-92 CARP awarded PTV more than the approximate amount of fees paid into the royalty funds for the carriage of PTV signals. *See* Hazlett W.D.T. at 40. Indeed, PTV's award was more than two and one half times as large as its fee generated share of the royalties. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55663. Unlike Dr. Johnson's facile suggestion in this proceeding that PTV's royalties in excess of its fee generation simply be drawn out of the minimum fee pool, *see* Tr. 9299-00 (Johnson), PTV's royalties came out of the royalties paid for the carriage of other signals

in the 1990-92 period, *see* Hazlett W.D.T. at 40. Indeed, more than 60% of PTV's royalties were pulled out of the pool of royalties generated by the carriage of other signals. *See* Tr. 5374 (Bennett) (PTV royalties pulled from those generated by other stations). This effectively gave PTV a share of the royalties generated by WTBS and WWOR. *See id.* It is accordingly inequitable for PTV to suggest that its royalties should not be decreased because it did not benefit from WTBS's widespread carriage.

F. **Recommended Award**

366. Consistent with the results of the Bortz survey, as adjusted to account for the PTV-only systems excluded from the survey, PTV's "starting point" for an award would be **3.4%** of the Basic Fund royalties. That award is consistent with the total amount of fees generated by the carriage of distant PTV signals That result should be the top end of the range for PTV; there is substantial evidence with regard to the "seller's perspective" that PTV should be adjusted downward.

IV. **CANADIANS BASIC FUND AWARD**

A. **Nature of Canadians Claim**

367. The Canadian Claimants represent the Canadian-produced programming on the Canadian signals that are retransmitted in the United States by cable systems. While the Canadian Claimants' claim in this proceeding mirrors PTV's in the sense that it is limited to a particular class of signals, it is complicated by the fact that Canadian signals carry a mix of Canadian produced, JSC and Program Supplier programming.

368. As to the Canadian-produced programming itself, it resembles the programming broadcast on U.S. broadcast stations and cable networks. Indeed, in some cases, the resemblance is more than strong; as Lucy Medeiros testified, a substantial

portion of the Canadian-produced programming on Canadian signals is available on U.S. cable systems on either broadcast or cable network. *See* Tr. 5243-46 (Medeiros) (identifying programming also available in the United States). Canadian Exhibit 1-F provides a list of such properties. As evidenced by this crossover of programming, the value of Canadian-produced programming on Canadian signals is diluted by its availability in the United States. The Canadian Claimants could not quantify how many hours of Canadian-produced programs were duplicated on U.S. broadcast and cable outlets. *See* Tr. 5386-87 (Bennett).

369. One unique aspect of the Canadian Claimants claim in this proceeding is the fact that a 40% of the royalties generated by the carriage of Canadian signals are paid by a single system in Washington State. *See* Tr. 5352 (Bennett). That system carries a Canadian signal, CBUT, as its only distant signal. *See* Tr. 5355 (Bennett).

B. **Value of Canadian Programming as Shown in Bortz Survey**

370. The unadjusted Bortz survey shows an allocation of 0.4% and 0.2% to the Canadian Claimants in 1998 and 1999, respectively. However, as Mr. Trautman acknowledges, some adjustment must be made to account for the Canadian-only systems that were excluded from the Bortz survey. As a result of Mr. Trautman's adjustments (as discussed above), the Canadian Claimants shares under the 1990-92 CARP approach are 1.7% and 2.0% in 1998 and 1999, respectively and 1.5% and 1.6% in 1998 and 1999 under the Bortz survey adjustment.

C. **Value of Canadian Programming as Shown in Other Quantitative Studies**

371. The Canadian Claimants are in the odd position of not being measured by two of the quantitative studies in the record. The Nielsen study does not include the

amount of time spent viewing distant Canadian signals. Furthermore, while Dr. Rosston includes programming time attributable to Canadian Claimants in his regression analyses, those analyses fail to come up with statistically significant measures of the value of an additional minute of Canadian-produced programming in terms of increased royalties. *See* Rosston W.D.T. at 21 n. 6 ("the results indicate that one cannot conclude that an additional minute of Canadian programming has a statistically significant effect on the amount of royalties paid by a system.").

1. **Fratrik Time Study**

372. The Fratrik time study is one of the few quantitative measures in this proceeding that renders a positive value for the Canadian Claimants. However, for the reasons stated above in paragraphs 188-195 the Fratrik time study is not a valid basis for measuring the Canadian Claimants' relative marketplace value.

2. **Canadian Approach**

373. The Canadian Claimants' approach to allocating royalties for Canadian-produced programming has been dubbed a "fee-gen-plus-time-and-value" method. In this regard, the Canadian Claimants, unlike PTV, are satisfied to accept an award of royalties based on fee-generation. Canadian Claimants make no attempt to prove that Canadian stations are valued disproportionately to other types of signals when they are carried by cable systems.

374. The Canadian Claimants first identify the amount of fees generated by the carriage of Canadian signals by U.S. cable systems. *See* Bennett W.D.T. at 5-6. Mr. Bennett also performs a time study to determine the amount of compensable programming by category – Canadian-produced, JSC, and U.S.-produced – on each Canadian station. *See id.* at 6-7. That study showed that Canadian programming accounted for roughly 80%

of the programming time on Canadian stations carried as distant signals. *See id.* at 7. Dr. Ringold also conducts the constant sum valuation survey discussed above in paragraphs 123-128 to determine the value of the different types of programming on Canadian signals. *See generally* Canadian Ex. 5-A (Ringold study). Dr. Ringold's study showed that Canadian-produced programming accounted for 59% and 58% of the value to cable operators when they carried a Canadian distant signal in 1998 and 1999, respectively. *See id.* at 13.

375. Using this data, the Canadian Claimants seek a "midpoint" between the values allocated to Canadian programming in Dr. Ringold's survey and the volume of Canadian programming in Mr. Bennett's time study. *See* Prehearing Memo of Canadian Claimants, at 6. Finding this midpoint to be 70%, the Canadian Claimants then request that percentage of the fees generated by Canadian distant signals.

376. While the CARP generally adopted the Canadian Claimants' approach in the 1990-92 Proceeding, it refused to give the Canadian Claimants credit for the amount of volume of Canadian-produced programming on Canadian stations, relying on the results of the Canadian survey instead. *See* 1990-92 CARP Report at 140-41. The CARP's approach was appropriate. As stated many times in the preceding sections, time-based measures are not a valid basis for allocating royalties. Indeed, using a time-based measure to allocate royalties to Canadian Claimants is particularly inappropriate given the fact that the Canadian Claimants have produced a valuation study that shows that the time associated with its programming category is not directly related to its value.

377. As stated in paragraphs 338-345, it would be improper for the Canadian Claimants to be awarded their fee-generated share of royalties (as adjusted by Dr.

Ringold's constant sum survey) without also allocating PTV its fee-generated share of royalties. There is no basis in the record for treating one set of signals and the programming thereon differently than another set.

D. Changed Circumstances

378. Mr. Bennett's testimony shows that there have been relatively few changes in circumstances for the Canadian Claimants. The total amount of fees generated by the carriage of Canadian signals are "roughly the same" or "maybe a little lower" in 1998-99 than they were in the 1990-92 period. *See* Tr 5378-79 (Bennett). The total number of distant instances of carriage of Canadian signals declined slightly from 1990-92 to 1998-99. *See* Canadian Ex. 4-B at 7 (showing decline from 93 in 1990-1 to 78 in 1999-2). Offsetting that decrease in the total number of distant instances of carriage is an absolute increase in the number of subscribers receiving Canadian distant signals. *See id.* at 5.

E. Recommended Award

379. The Canadian Claimants should receive an award that is commensurate with their share of the Bortz study as adjusted for the number of Canadian-only systems. Because the two methodologies employed by Mr. Trautman differ somewhat in their results for the Canadian Claimants, the award should be within the range created by those results, which is 1.5-1.7% in 1998 and 1.6-2.0% in 1999. Accordingly, JSC recommended an award of **1.6%** in 1998 and **1.8%** in 1999, the midpoint of that range.

380. It should be emphasized that any increase in the Canadian Claimants' royalty award should result in a commensurate decrease in the awards to PTV and NAB, which have no programming on the Canadian signals. Any increase in the value should benefit the Canadian Claimants, JSC and the Program Suppliers. *See* Tr. 5381 (Bennett) (acknowledging that an increase benefits Canadians, JSC and Program Suppliers)

3.75% Fund Awards

3.75% Fund Awards

3.75% FUND AWARDS

381. The CRT's decision in the 1983 Proceeding, as left undisturbed in the 1989 Proceeding and the 1990-92 Proceeding, provides the Panel with an explanation of and foundation for the award of differential amounts of royalties for the different groups of claimants the participate in the 3.75% Fund.

382. The 3.75% Fund was established in the context of the 1983 Proceeding, the first proceeding in which royalties paid in at the 3.75% rate were distributed. The 3.75% royalty rate in itself was the creation of the complex relationship between the FCC's rules concerning the importation of distant signals and the Section 111 compulsory license. At the time the compulsory license was enacted, the FCC had in place certain complex rules limiting the number of independent and network distant signals that could be imported by cable systems. Thus, for example, a cable system in a large market might be free to import up to two distant independent signals, while a cable system in a smaller market might be allowed to import only one distant independent signal or, based on the circumstances, none. However, the FCC's pre-1980 signal importation rules did allow unlimited amounts of carriage of certain distant signals: noncommercial (PTV) stations, foreign language stations, and "specialty" stations, which were defined as any commercial station that broadcast foreign language, religious, and/or automated programming at least one-third of the average week. *See* 1983 CRT Determination, 51 Fed. Reg. at 12804.

383. In 1980, the FCC lifted those limitations on the importation of distant signals, which triggered the existing version of Section 801(b)(2)(B), which allowed the CRT to set the royalty rates for the additional signals that could be carried based upon a change in the FCC's rules. *See id.* That rate was then set by the CRT according to a determination of the marketplace value of such signals at 3.75%. *See id.*

384. As stated above, the 1983 Proceeding was the first in which royalties paid at the 3.75% would be distributed. In that proceeding, there was a question of whether there should be a separate fund from which the 3.75% royalties could be allocated or whether the royalties should be distributed from a single fund from which all claimants were compensated. The CRT concluded that it was appropriate to compensate only those claimants who had programming on the signals that generated 3.75% royalties. *See* 1983 CRT Determination, 51 Fed. Reg. at 12807-08. While acknowledging that it, in fact, was engaging in the practice of making awards on the basis of fee-generation, the CRT held that:

> We believe it would be inconsistent with past actions to disregard now the different amount of carriage of program types which occurred pursuant to the new rates, or to ignore the different factors and rationale underlying the deleted FCC regulations.

1983 CRT Determination, 51 Fed. Reg. at 12808.

385. When it came to making allocations from the 3.75% Fund, the CRT took the same signal-carriage patterns into account. It recognized that "much of the testimony and evidence applied to both basic and 3.75% distant signal carriage" and thus based its award of 3.75% royalties upon "how does [the 3.75% fund] modify our view of the basic fund." 1983 CRT Determination, 51 Fed. Reg. at 12813. Accordingly, it:

* Excluded PTV from the 3.75% fund because noncommercial stations could not generate 3.75% royalties;

* Reduced the awards given to both the Canadian Claimants and Devotional Claimants for the fact that specialty stations were not subject to the FCC signal importation limitations. French-language Canadian stations and religious-oriented stations could not generate 3.75% royalties.

* Further reduced the award to the Devotional Claimants, because any credit they received for cable systems desiring programming

diversity would not apply to signals carried at the 3.75% rate. The CRT concluded that the primary considerations for the importation of 3.75% signals were the movies, sports and syndicated series available on those stations;

* Made a minor credit to Canadian Claimants based on the difficulty of identifying the particular 3.75% signal carried, given that it was left to the cable system to choose which signal to report as the 3.75%. The CRT found that Canadian signals should be given slightly more credit in light of this arbitrariness; and

* Concluded that the award to NAB and the Music Claimants should remain the same as the basic fund. As to Music, the CRT held that Music had not shown that musical works contributed relatively more to programming on 3.75% stations than on basic stations. As to NAB, the CRT noted that the viewing of NAB programming was lower on 3.75% stations, but chose not to penalize NAB. The CRT stated that it "observed no difference in their attitudinal data for 3.75% stations."

1983 CRT Determination, 51 Fed. Reg. at 12813-14. Accordingly, the CRT removed PTV's 5.2 percentage points from the Basic Fund allocations and deducted a total of 0.85 percentage points from the Devotional Claimants and the Canadian Claimants. Those reductions left the CRT with a pool of 6.05 percentage points. It allocated 4.9 percentage points to the Program Suppliers and 1.15 percentage points to the JSC, increasing the JSC from 16.35% of the Basic Fund to 17.5% of the 3.75% Fund. *See* 1983 CRT Determination, 51 Fed. Reg. at 12818.

386. In the 1989 Proceeding, the CRT summarily concluded that "[n]o evidence was introduced in this proceeding to challenge" the conclusions in the 1983 Proceeding with regard to the 3.75% Fund allocations. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303. Accordingly, the CRT removed PTV's 4.0 percentage points from the Basic Fund allocations and deducted a total of 0.8 percentage points from the Devotional Claimants and the Canadian Claimants. Those reductions left the CRT with a pool of 4.8 percentage points to allocate among JSC and Program Suppliers. It allocated 2.6 percentage points to

the Program Suppliers and 2.2 percentage points to the JSC – increasing the JSC from 23.8% to 26% for the 3.75% Fund. *See* 1989 CRT Determination, 57 Fed. Reg. at 15304.

387. In the 1990-92 Proceeding, the CARP essentially invoked the same process as the CRT in the 1989 Proceeding, declaring that "little new argument is made concerning its distribution." 1990-92 CARP Report at 142. After deducting PTV's 5.75% share and taking a total of 0.95 percentage points from the Devotional and Canadian Claimants' Basic Fund allocations, the CARP had a pool of 6.7 percentage points to allocate between the Program Suppliers and the JSC. The CARP adjusted Program Suppliers' share 3.6% upwards, the JSC's share 3.1% upwards, from 29.5% of the Basic Fund to 32.6% of the 3.75% Fund. *See id.* at 143.

388. The JSC challenged the CARP's award before the Librarian on two grounds. *First*, the JSC argued that it had put in substantial evidence that carriage of 3.75% signals was motivated principally by a desire by cable systems to import distant signal sports. The JSC did so through the testimony of Jerry Maglio, a cable operator who testified that the only reason to pay the 3.75% rate was to gain access to sports programming, and through an analysis of the proportion of 3.75% signals that carried sports programming. *See* 61 Fed. Reg. at 55662. *Second*, the JSC argued that the CARP's award of 0.35% to the Canadian Claimants was inconsistent with its use of the fees-generated methodology, given that Canadian signals accounted for only 0.31% of the 3.75% royalties, and that, pursuant to the Canadian constant sum survey, it should have received 29% of those royalties. *See* 61 Fed. Reg. at 55663. The Librarian put these issues to the Panel through certified questions, and the Panel responded by indicating that it had considered the JSC's evidence concerning the special importance of sports

programming to 3.75% signals and rejected it, but that its allocation of 3.75% royalties to the Canadian Claimants was in error. *See id.* The Panel did not, however, suggest a new allocation to the Canadian Claimants. *See id.*

389. Upon reviewing the Panel's determination, the Librarian upheld the Panel's determination as to the JSC's evidence. While expressing concern about the "shorthand and tossaway conclusory sentences" used to allocate the millions of dollars in 3.75% royalties, the Librarian could not conclude that the Panel's decision was arbitrary. *See id.* (quoting *National Association of Broadcasters v. CRT*, 772 F.2d 922, 931 n. 10 (D.C. Cir. 1985). The Librarian also took it upon himself to reallocate the Canadian Claimants' 0.35% share of the 3.75% royalties pursuant to the values shown in the Canadian constant sum survey. *See* 61 Fed. Reg. at 55663-64.

390. Accordingly, to the extent that the Panel may be frustrated over the paucity of evidence concerning the distribution of the 3.75% Fund in this proceeding, the JSC share such frustration, having expended considerable resources in the 1990-92 Proceeding in pursuit of an increased share of 3.75% royalties. Indeed, the JSC have designated Mr. Maglio's testimony into the record of this proceeding,[64] and the Panel should consider that testimony in making its allocation. However, the JSC are unaware of any compelling new evidence in this proceeding to alter the relative adjustments in the Basic Fund shares engaged in by the prior CARP and the CRT.

391. Given the level of adjustments used in prior proceedings, it appears that the CRT and CARP adjusted the JSC's share of the Basic Fund up by approximately 10% in

[64] Mr. Maglio's testimony is in Volume 5 of the JSC's Direct Case at Tab 28.

the 1983, 1989 and 1990-92 Proceedings. JSC submit that the same level adjustment would be appropriate in this proceeding. Accordingly, based on the JSC's request for an award of 37% in 1998 and 38.8% in 1999, the JSC should receive awards of 40.7% and 42.7% from the 1998 and 1999 3.75% Funds, respectively.

392. However, one final note is necessary. Because the Canadian Claimants have requested their fee-generated share of Basic Fund royalties, they should also receive their fee-generated share of 3.75% Fund royalties. Using Mr. Bennett's testimony and Canadian Exhibit 4, it appears as though Canadian stations generated 0.25% of the 1998 3.75% Fund royalties and 0.63% of the 1999 3.75% Fund royalties. The relative values of Canadian-produced programming, JSC programming and U.S.-produced programming generated by the Canadian survey should be applied to those fee-generated figures, leaving the Canadians with a 0.15% share of the 3.75% Fund in 1998, and 0.37% of the 3.75% Fund in 1999.

Music Awards

MUSIC AWARDS

I. THE MUSIC CLAIMANTS' DURATION STUDY

A. Methodology of Study

393. The study submitted in the testimony of Messrs. Boyle and Krupit on behalf of the Music Claimants ("Music Study") purports to show that the amount of music used on certain distant signals increased by 11.04% between 1991-92 and 1998-99. Boyle W.D.T. at 15, as corrected by W.R.T. at 1.[65] The Music Claimants argue that this increase in music use compels an equivalent 11.04% increase in the royalty share they received pursuant to a settlement agreement covering the 1991 and 1992 cable royalty funds. The settlement agreement accorded the Music Claimants 4.5% of the 1991-92 funds and they now seek 5.0% of the 1998-99 funds. Boyle W.R.T. at 2.

394. The Music Study is premised on the assumption that the Music Claimants' 4.5% share of the 1991-92 cable royalty funds reflected the relative market value of the musical works on distant signals during those years and could thus be used as a benchmark. Boyle W.D.T. at 6; Tr. 4411-12 (Boyle). The Music Claimants then attempt to perform a comparison of the amount of music used on distant signal programming in 1991-92 benchmark and in 1998-99.

395. To perform this comparison, the Music Claimants selected two samples of distant signals. The goal of the selection exercise was to choose stations that represented large shares of the fees generated by the carriage of distant signals, not necessarily to

[65] The Music Claimants' calculation of the change in the amount of music used on distant signals between 1991-92 and 1998-99 was originally 13.4%, but was corrected to 11.04% due to an error in counting minutes of music on the program *Night Tracks*. Boyle W.R.T. at 1.

Footnote continued on next page

choose a representative sample of stations carried on a distant basis. Tr. 4452-54 (Boyle).[66] For 1991-92, Dr. Boyle used the same set of stations that had in fact been selected when the Music Claimants were preparing a study for the 1989 proceeding.[67] Tr. 4451, 4785 (Boyle). For the 1989 study, he chose a sample of the top five royalty fee generating distant signals and a random sample of five stations (as a group given the fictitious call sign "WRST") to represent the more than 700 other stations carried as distant signals in those years. Boyle W.D.T. at 10-11 and Figure 1.

396. For 1998-99, Dr. Boyle selected what he erroneously thought were the top nine royalty generating distant signals,[68] which included four of the five signals in this category for 1991-92; he retained WTBS for "consistency" purposes (WTBS had been in the top five royalty generating distant signals in 1991-92 but no longer generated significant royalties), Tr. 4789-90 (Boyle); and he retained the five other representative distant signals that he had used for 1991-92.[69] Boyle W.D.T. at 10-11 and Figure 2. He

Footnote continued from previous page

[66] There were only two network affiliate stations in the 1998-99 sample. Tr. 4798-99 (Boyle). There were no non-commercial stations at all in the 1991-92 sample. Tr. 4563, 4798-99 (Boyle). In 1998-99 there were two public television stations in the sample, Tr. 4971-73 (Boyle), but they would not have been included if the selection had been limited to royalties attributable to distant carriage as it was in 1991-92. *See supra* n. 4.

[67] The Music Claimants' settled out of the 1989 proceeding after submitting their direct case to the CRT. Tr. at 4451 (Boyle).

[68] Dr. Boyle chose his 1998-99 stations from a list that attributed royalties to stations for both distant and local carriage rather than just distant carriage. Tr. 4570-73 (Boyle). His sample of the top stations in 1998-99 was thus selected and weighted based on revenue data reflecting local as well as distant carriage. *See* JSC Exhibit 34-X (Larson printout showing revenue based on distant and local carriage). As a result, the Music Study included two non-commercial stations that were not among the nine stations that generated the most *distant signal* royalties during 1998-99.

[69] The exact same sample of smaller stations selected for the 1989 study was retained for both 1991-92 and 1998-99, despite the fact that by 1998-99 some of the stations no

Footnote continued on next page

increased the number of stations in the study in 1998-99 because the top five stations reflected a lower relative percentage of fees generated. *See* Boyle W.D.T. at Figure 1.[70] At the same time, the absolute dollar cutoff for a station to be one of the top five royalty generating stations declined significantly.[71]

397. Mr. Krupit then estimated the number of minutes of music played on each of the selected stations in 1991-92 and 1998-99 for a "composite week" of seven randomly chosen days per year,[72] so that each period included observations on fourteen days. Krupit W.D.T. at 5-6.[73] He based his estimates on an examination of cue sheets for approximately 77% of the programming on the stations in 1991-92 and 73% in 1998-99. Krupit W.D.T. at 9; Tr. 4269-70 (Krupit); *see also* Music W.D.T. at Exhibits 33 and 34.

Footnote continued from previous page
longer fit into the economic weight subgroup (over or under $250,000 in fees generated) they had been in during 1989. Tr. 4944-47 (Boyle); Exhibit PS 37-X. In addition, one station, KSHB, switched from independent to commercial network status between 1991-92 and 1998-99, with a resulting significant change in the number of music minutes contained in the study. Tr. 4869-71 (Boyle).

[70] For the 1991-92 period, the top five fee generating stations represented 80.2 percent of the fees generated, while for 1998-99 the top nine fee generating stations plus WTBS represented only 61.3 percent of the fees generated. Tr. 4938-39 (Boyle).

[71] For 1991-92, the cutoff for the top five stations was the generation of total fees of $5.5 million or more, while for 1998-99 the cutoff for the top five stations was just under $1.5 million. Tr. 4789-90 (Boyle).

[72] Mr. Krupit acknowledged that there was an error in the selection of the composite week for 1998. Tr. 4240 (Krupit).

[73] There is a great deal of volatility, or variation, in the average minutes of music played across the 14 days of data collected for each station in the 1991-92 and 1998-99 samples. Schink W.R.T. at 11 n.11; Tr. 8522-23 (Schink); *see* Tr. 4468-69 (no effort was made to examine the reasons for the disparity in the number of minutes of music use per hour for various commercial stations), 4471-73 (Boyle).

(lists of programs matched with cue sheets for 1991-92 and 1998-99).[74] Each minute of music was given equal weight in the analysis. Tr. 4857-58 (Boyle).

398. The sample of matched cue sheets within the Music Study was not consistent for each claimant group, either as compared to other claimant groups, Tr. 4279 (Krupit), or for the same claimant group between the two different sets of cue sheets for 1991-92 and 1998-99. For instance, none of the 1991-92 matched cue sheets, and only eight of the 1998-99 matched cue sheets, involved sports programming. Tr. at 4353-54, 4336 (Krupit); Music W.D.T. Exhibits 33 and 34 (lists of programs indicating whether a cue sheet match was found).[75] The cue sheet match percentage for JSC was thus 0% in 1991-92 (no cue sheets matched) and 20-25% in 1998-99 (eight out of thirty-five programs had matching cue sheets). Tr. 4331-32 (Krupit). No PTV programs were included in the 1991-92 cue sheets because no public television signals were included in the station sample covered by the study in 1991-92, but multiple matches for PTV programs were found for 1998-99, when two public television stations were included in the station sample. Tr. 4328-29 (Krupit); Tr. 4563 (Boyle); Music W.D.T. Exhibits 33 and 34.[76] None of the matched cue sheets in any of the years involved local news programming. Tr. 4301, 4304-05 (Krupit); Music W.D.T. Exhibits 33 and 34 (no matches

[74] All programming for the sample stations with matching cue sheets was included in the study. No special procedures were followed for noncompensable programming on WGN. Tr. 4831 (Boyle); Tr. 8529 (Schink).

[75] Out of this small number, two Cubs games from 1997 appear to have been incorrectly included in the matched cue sheets for the 1998-99 composite week. Tr. 4266-67 (Krupit).

[76] Dr. Boyle conceded that the Music Study does not indicate whether there is an increase in music use on PTV stations between 1991-92 and 1998-99. Tr. 4979-80 (Boyle).

shown for local news programs).[77] Many matches were found for syndicated programs and series. Tr. 4394 (Krupit).[78]

399. Dr. Boyle took the data on music minutes calculated by Mr. Krupit and attempted to estimate the change in the weighted average minutes of music played per program hour between 1991-92 and 1998-99. Each observation used to calculate the weighted averages compared the average number of music minutes per hour (excluding commercials and promotional announcements) with the total number of broadcast minutes allocated for the program (including commercials and promotional announcements). Tr. 4459, 4960-63 (Boyle). The weights used were based upon the royalties generated by each of the top stations and the revenue generated by the remaining stations as a group. Boyle W.D.T. at 13-15.[79]

[77] Mr. Krupit testified during the direct case hearings that there were no matched cue sheets for local news programming. However, during the rebuttal hearings the Commercial Television Claimants introduced a stipulation with the Music Claimants suggesting the existence of a limited number of such cue sheets. *See* NAB Exhibit 39-RX and Tr. 8455-57 (Schink).

[78] Dr. Boyle acknowledged a number of scenarios under which these discrepancies in cue sheet matches could have an impact on the results of the Music Study. For instance, the lack of matched cue sheets for station-produced news could increase the average music use measured, because these programs tend to have lower than average minutes of music per hour. Tr. 4841 (Boyle). Unless the percentages of compliance stayed exactly the same between 1991-92 and 1998-99, you might get different degrees of variation around the averages for the different categories. Tr. 4897-98 (Boyle). There could also be an impact on the result if the proportion of total use for each category or the music intensity (way music is used) changed between the periods. Tr. 4900-01 (Boyle).

[79] Dr. Schink explained that the weighted averages of the results for the Music Study were not properly defined, because the weights used were not constants, but random variables. Schink W.R.T. at 12. Improper weighting of one random variable – the minutes of music – by another – the amount of carriage – invalidated the resulting confidence intervals. Tr. 8518-20 (Schink).

400. According to Dr. Boyle, there were 19.83 weighted minutes of music in each hour of distant signal programming during the years 1991-92 and 22.02 weighted minutes in each hour of distant signal programming during the years 1998-99 – an increase of 11.04%. Boyle W.D.T. at 15 (claiming increase of 13.4%, as corrected in Boyle W.R.T. at 8-9 (the calculation of the weighted average was affected by the *Night Tracks* error that was discovered after Music submitted its direct case).

B. **Flaws in Study**

401. The Music Study suffers from several flaws that were discussed during the cross-examination of various witnesses as well as during the direct testimony of Dr. Schink. The most significant conceptual concerns identified by Dr. Schink are discussed in this section.[80]

1. **Relative Value**

402. The Music Study is based solely on changes in music use, but changes in music use alone do not support a change in the Music Claimants' share of royalties. The musical works for which the Music Claimants seek royalties are simply one of many elements of the programming carried on distant signals. Schink W.R.T. at 9. The purpose of this proceeding is not to determine the *absolute* value of those musical works but to determine their *relative* value compared to the other program elements that contribute to the value of that programming, which are represented by the remaining claimants. Schink W.R.T. at 9.

[80] In addition, the Music study contained numerous design and implementation flaws. *See, e.g.*, Schink W.R.T. at 11 and notes 11 & 12.

403. This concept of relative value presumably was the CRT's rationale for basing the Music Claimants' share of the first cable royalty fund (1978) on the share of music license fees compared to the total programming costs of broadcast television. 1978 CRT Determination at 63026 (September 23, 1980) (setting Music Claimants' royalty share at 4.5%). The same principle provided the rationale for decreasing the Music Claimants' share in the 1979 proceeding when the Music Claimants' share of total broadcast programming expenses declined. 1979 CRT Determination at 9879 (March 8, 1982) (reducing Music Claimants' royalty share to 4.25%).

404. In the context of this proceeding, the size of the payment available to compensate all of the eligible copyright owners, including the Music Claimants, is set by law and is not determined in a marketplace setting. The issue in the current context is how to equitably divide the given pool of funds among the claimants. To do this, one must look at the relative contributions of *all the claimants* to the value of the programming carried on the distant signals. Schink W.R.T. at 8-9. As discussed in greater detail below, Dr. Schink's methodology for calculating the Music Claimants' share relies on a method similar to that used by the CRT in order to account for this unique feature of the compulsory license context in which the Music Claimants' share must be determined.

2. **Voluntary Settlement**

405. The Music Study is based on the incorrect assumption that the Music Claimants' 4.5% share of 1991-92 cable royalties is a proper benchmark from which changed circumstances can be measured. *See* Boyle W.D.T. at 7-8. The Music Claimants received that 4.5% award solely as part of a voluntary, non-precedential settlement of litigation, and not as a result of the 1990-92 CARP making any determination as to the

relative marketplace value of musical works.[81] In fact, no evidence concerning the relative value of musical works was presented to the CARP in the 1990-92 proceeding. Tr. 4953-54 (Boyle).

406. Instead, the last time that the music share was subjected to litigation scrutiny was 1983. And that decision relied heavily on analyses done for the 1978, 1979, and 1980 proceedings where the Copyright Royalty Tribunal ("CRT") compared broadcast license fees to total broadcasting expenses. *See* 1983 CRT Determination at 12972 (April 15, 1986). There is thus no reasonable basis for assuming that the 1991-92 music share is an appropriate marketplace benchmark of the relative market value of musical works.

407. The major issue before the Panel is the relative value of the programming of various claimant groups to cable operators. Schink W.R.T. at 8-9; Tr. 8496-98 (Schink). The fact that other claimant groups were willing to settle the 1990-92 CARP litigation with the Music Claimants for 4.5% does not establish that the relative value of musical works in 1991-92 was 4.5%. Schink W.R.T. at 5. It demonstrates neither that the

---

[81] The "Stipulation of Settlement of Claim of Music Claimants to the 1991 and 1992 Cable Royalty Funds" (the "Stipulation") filed with the Copyright Office in June 1995 by all parties to the proceeding, including the Music Claimants, makes clear that Music's 1991-92 share reflects a compromise agreement among the parties for purposes of settling litigation, and not any underlying principle regarding the value of music in 1991-92 relative to other copyrighted works:

> The terms set forth in this stipulation represent a compromise and settlement and apply to the 1991 and 1992 Cable Royalty Distribution Proceedings only; *no party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation.*

Footnote continued on next page

other claimants considered a 4.5% royalty share as reflective of the relative market value of musical works in those years, nor that that 4.5% share was in fact reflective of such value.

408. All that can be inferred from the settlement is the apparent view by the other claimants that the expected cost of litigating the Music Claimants' 4.5% share exceeded the value to those claimants (individually and collectively) of the expected decrease in the Music Claimants' share that could be accomplished by litigation. This decision was made by the other claimants without the benefit of testing the Music Claimants' positions through litigation, so there would have been substantial uncertainty about both how large a reduction might be accomplished by litigation and how that reduction would affect any given claimant. Schink W.R.T. at 8.[82] Thus, the Music Study fails to demonstrate a change in relative value in the Music Claimants' share between the (incorrect) benchmark year selected by the Music Claimants and 1998-99.

409. JSC and all of the other programming claimants filed a Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award (January 16, 2003) requesting the Copyright Office to rule that this Panel may not use as a benchmark, for purposes of determining "changed circumstances," the Music Claimants' 1991-92 settlement award. The Copyright Office rejected the request, stating that the

---

Footnote continued from previous page
Exhibit A to Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award (filed January 16, 2003) (emphasis added).

[82] The Music Claimants suggested that they also gave up the ability to get a larger share of the 1991-92 royalty pool. However, as Dr. Schink explained, they had a better sense of the strength of their claim and were able to approach settlement negotiations with more information than the other parties. Tr. 8496 (Schink).

determination of the usefulness of a benchmark is a factual question properly considered by the CARP. The Office further noted that "the proper body to consider the merits of the Music Claimants' settlement agreement, including its admissibility under the terms of the stipulated agreement and its proper place in this proceeding, if any, is, just as it has always been, the fact-finding entity charged with consideration of the evidence – in this case, the CARP." Order of March 20, 2003 at 24.[83]

410. The Office also noted that "in two prior proceedings, settlement agreements were offered into evidence and the decision making body in both instances declined to consider them in making a determination." *Id.*, citing 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9887-88 and 9895 (March 8, 1982); 1991 Satellite Carrier Rate Adjustment Proceeding, Notice of Final Determination, 57 Fed. Reg. 19052, 19058 n. 16 (May 1, 1992).

> [T]he cited decisions represent past precedent and the panel must consider these decisions and any other past precedent in its deliberations . . . . [A] CARP may deviate from past precedent provided that the panel articulates a reasoned basis for taking a different approach. The CARP cannot do this, however, unless it has a fully developed written record, including why the Music Claimants think the 1991-92 settlement figures represent an appropriate benchmark for use in the current proceeding.

Order of March 20, 2003 at 24. The Music Claimants have developed no such written record. They have failed to present evidence as to why the 1991-92 non-precedential settlement represents an appropriate benchmark for use in this proceeding, and Dr. Schink

---

[83] For the reasons set forth in the Joint Motion and Joint Reply in Support of Motion for Declaratory Ruling Concerning the Benchmark for the Music Award, which are incorporated herein by reference, JSC submit that the settlement agreement is not admissible under the terms of the stipulated agreement and should be given no weight in the Panel's determination.

has established that, to the contrary, it is improper to use the 1991-92 settlement as a benchmark. Schink W.R.T. at 7-8.

411. At the request of the Joint Petitioners, who were concerned that the Music Claimants would portray the inclusion of their award in the 1990-92 Librarian's final order as a "substantive ruling that in a free market absent a compulsory license the Music Claimants would have received 4.5% for the 1990-92 royalties," (quoting Joint Reply at 3), the Copyright Office went on to clarify that "the Music Claimants received a 4.5% allocation of the 1990-92 cable royalty fees as a result of a voluntary settlement which was not based upon a litigated determination of the valuation of the musical works for 1990-92. . . . Moreover, the order in that proceeding makes it clear that the settlement figures were included in the final order merely to provide a comprehensive overview of the final allocations." Order of March 20, 2003 at 25. It is thus clear that the Librarian did not by his ministerial actions in the 1990-92 proceeding intend to give any precedential weight to the award it made to the Music Claimants.

3. **Different Music Uses**

412. The Music Claimants improperly chose to measure the use of music solely in terms of the duration of music play, so that each minute of music was given equal weight. Tr. 4857-58 (Boyle). The Music Study did not distinguish between the different types of music uses (e.g., feature, background, theme) despite the fact that the Music Claimants themselves do so in their own distribution systems and in negotiating licensing agreements. Tr. 4493-94, 4721-27, 4834-56 (Boyle); Tr. 4310, 4312 (Krupit). Indeed, prior to settling out of the 1989 proceeding, the Music Claimants submitted a study based on changes in "music use credits" between 1983 and 1989. That study took into account

both the minutes of music included in broadcast programming and the type of music use. *See* 1989 Boyle Study at Schink W.R.T. App. B.

413. A similar approach has also been used in rate court proceedings. *See, e.g.*, Tr. 4723-24, 4853-55 (Boyle) (ASCAP presented a study in a rate court case based on music use credits); Schink W.R.T. at 10 & n.10. Even by the Music Claimants' own measure, the analysis of changes in undifferentiated music use does not provide a proper measure of the changes in the *value* of the music used. Schink W.R.T. at 9.

4. **Music Use Trends**

414. The Music Claimants' data demonstrate that there is no upward trend in music use between 1991-92 and 1998-99. Schink W.R.T. at 10-13; *see also* Tr. 8499-01 (Schink). Prior to settling out of the 1989 proceeding, the Music Claimants also submitted a study of the amount of music used by certain distant signals in 1989 (without distinguishing among the types of use). Schink W.R.T. at App. C. That study, sponsored by Mr. Mack of BMI, utilized the same data collection procedure that was used in the Music Study for 1991-92 and 1998-99. Schink W.R.T. at 10-11. As set forth below, the data for all three periods demonstrate that there is no consistent upward trend in music played per hour of programming, although a trend could be mistakenly inferred by looking only at the change between 1991-92 and 1998-99.

415. The study results for each of the three periods are set forth below:

Weighted Average Minutes of Music Played Per Hour in the Music Claimants' Studies		
1989	**1991-92**	**1998-99**
21.80	19.83	22.02

See Schink W.R.T. at Appendix C (Mack study); Boyle W.D.T. at 16, Figure 6.

416. The absence of any upward trend in music played per hour of programming was confirmed when Dr. Schink looked at a simple average of the minutes of music for each period included in the 1989 Mack study and the Music Study in order to define a meaningful simple average for each period and make meaningful statistical comparisons between these simple averages. (As discussed above, by contrast the results of comparisons based on Dr. Boyle's weighted averages are invalid because the weights used are random variables rather than constants.) The comparison looked at stations included in all three studies. These stations are the top five (WTBS, WGN, WWOR, WPIX, WSBK), and WRST which is the combined data for KBHK, KSHB, KJZZ (formerly KXIV), WBAL, and WITN. See Schink W.R.T. at 12 & n. 13, App. A, Table A-1. The results are shown below:

Simple Average of Minutes of Music Played Per Hour in the Music Claimants' Studies

Type	**1989**	**1991-92**	**1998-99**
Top Five Stations	21.92	20.19	20.55
All Stations	21.68	20.11	20.71

Schink W.R.T. App. A, Table A-1.

417. Dr. Schink also computed 95% confidence intervals around the simple averages for 1991-92 and 1998-99. The confidence intervals confirm the view that there was no statistically meaningful change in the minutes of music played between 1991-92 and 1998-99. Schink W.R.T. at 13 and App. A, Figure A-1. (The Mack study did not contain the data needed to compute similar confidence intervals. Schink W.R.T. at 13 n.14 and App. C.) A t-test analysis also confirmed that there was no statistically significant

change in the average minutes per hour of music played between 1991-92 and 1998-99 for the top five station sample or for the all station sample. Schink W.R.T. at 13 and Appendix A, Table A-2.

418. In any event, the mere 11.04% increase reflected in the Music Study (even if it were accurate) pales in comparison to the significant increases that the Music Claimants demonstrated in the 1983 proceeding, the last in which they litigated their royalty claim. In that proceeding, the Music Claimants were able to show increases in music programs on superstations and other distant signals ranging from 180% to 267%. Schink W.R.T. at 13 n.15 and App. D; Tr. 8543-44 (Schink); *see also* Tr. 4651-53 (Boyle). They also focused on the fact that superstations and other distant signals had extensive use of music videos in 1983, which reflected a significant change in circumstances since the last litigated proceeding. Indeed, the Music Claimants referred to 1983 as the "year of the music video." JSC Demo Exhibit 22 at 7 (1983 Proposed Findings of Music Claimants).[84]

419. Based upon this type of evidence, in 1983 the CRT increased the Music Claimants' award from 4.25% to 4.5%. 1983 CRT Determination, 51 Fed. Reg. at 12812. There is simply no comparable evidence supporting the Music Claimants' request for 1998-99.

II. THE RELATIVE VALUE OF MUSIC'S TELEVISION CLAIM

420. The Music Claimants have negotiated several license agreements with broadcast television stations, broadcast networks, cable networks, and cable operators.

[84] There is no evidence of any such extensive use of music videos in 1998-99. Tr. 4315-18 (Krupit).

Yet, the Music Claimants chose not to offer evidence of any of their marketplace negotiations to support a royalty claim as high as the 4.5% that they have been receiving. The only evidence of such agreements is that which was discussed during the cross-examination of Dr. Boyle and that which was presented by JSC witness Dr. Schink.

421. The testimony of Dr. Boyle suggested that music license fees paid by broadcasters, cable networks, and cable operators generally amount to approximately 1% of licensees' relative revenues. Tr. 4734-70 (Boyle) (discussing various license fees during cross-examination).

422. Furthermore, as discussed below, Dr. Schink's study shows that music license fees amount to between 1.49% and 2.33% of broadcast programming expenses. Schink W.R.T. at 17. It further shows that music license fees amount to approximately 2.07% of the cable networks' programming expenses. Schink W.R.T. at 20. In light of this record evidence, JSC believes that the Music Claimants' award should be set at 2% of the 1998-99 Basic and 3.75 royalty funds.

A. **Methodology of Dr. Schink's Study**

423. Dr. Schink concluded that the appropriate way to look at music license fees was to compare them to broadcast programming as a whole, because that is comparable to the task before the Panel in this proceeding. The distinctions between programming on different stations have largely evaporated and looking at the marketplace as a whole provides the most appropriate picture of the worth of music compared to other programming rights. Schink W.R.T. at 14; Tr. 8566-68 (Schink). Furthermore, the study undertaken by Dr. Schink to assess the Music Claimants' appropriate royalty share for 1998-99 (the "Schink Study") was based on the general approach that the CRT adopted (at the urging of certain of the Music Claimants themselves) in the first cable royalty

distribution proceedings. Tr. 8534 (Schink). In 1978, when it awarded the Music Claimants 4.5% of the 1978 fund, the CRT adopted the approach advocated by the Music Claimants of comparing the license fees that the Music Claimants receive from broadcasters and the other program expenses incurred by those broadcasters. It determined, however, that the three categories of programming expenditures selected by the Music Claimants for the comparison were too narrow, and it compared the music license fees to a broader range of programming expenditures. 1978 CRT Determination, 45 Fed. Reg. at 63026 (September 23, 1980) (Music Claimants' proposed methodology of comparing music licensing fees with programming costs adopted by CRT but more programming costs used in calculation);[85] *see also* FCC Public Notice of "Broadcast Financial Data " Schink Appendix E.

424. For the 1979 proceeding, the CRT adopted a similar approach, once again looking at a broad range of program expenditures in comparison to music license fees. The Music Claimants' share of the royalty funds went down to 4.25% because the ratio of music license fees to program expenditures had declined since the 1978 proceeding. 1979 CRT Determination at 9879 (March 8, 1982) (CRT continues to use methodology to reduce Music award to 4.25%).

---

[85] The data used by the CRT was from FCC reports of Broadcast Financial Data that have since been discontinued. The CRT identified nine categories of expenses to include in program costs. The Music Claimants initially looked at only three categories of expenses in their calculations, but the CRT found that use of more categories was appropriate. *See* 1978 CRT Determination, 45 Fed. Reg. at 63026 (September 23, 1980). *See also* FCC Public Notice of "Broadcast Financial Data" Schink Appendix E.

425. In 1980, the Music Claimants abandoned this approach because their share went down again. 1980 CRT Determination at 9552 (March 7, 1983) (final decision 49 Fed. Reg. 28090 (July 10, 1984).

426. The Schink Study takes the straightforward approach of determining a range for the Music Claimants' share of cable royalties by comparing the amounts the Music Claimants receive from broadcasters and cable networks with the total programming expenses of these broadcasters and cable networks. The study methodology, which borrows heavily from the methodology adopted by the CRT from 1978-80 at the initial request of the Music Claimants, thus reflects the license fees that the Music Claimants negotiate in the marketplace with various users of music, including those who use that music in copyrighted television programming, i.e., television broadcast stations, television broadcast networks and cable networks. The license fees that result from those negotiations provide the best available evidence of the marketplace value of musical works absent compulsory licensing. Schink W.R.T. at 14.

B. **Results of Dr. Schink's Study**

427. Dr. Schink looked at two independent marketplace measures of 1998-99 music licensing fees as compared to programming costs, both of which support the conclusion that the share of the Music Claimants out of the royalty pool for 1998-99 should be *no higher than 2.33%.*

1. **Broadcast Expenses**

428. Dr. Schink's analysis of commercial television's 1998 programming costs shows that music license fees represented only a small portion of those costs – between 1.49% and 2.33%. The U.S. Census Bureau report, a reliable source of data from the communications industry that was also relied on by Dr. Boyle in another CARP

proceeding, Tr. 4583-84 (Boyle); Tr. 8637-38, 8747 (Schink), shows that the commercial broadcast television industry paid $228 million in music licensing fees for the year 1998. In contrast, the report shows that broadcasters paid $9,571 million for the broadcast rights for "feature films, syndicated programming, sports events, etc." Other programming expenses (such as payments for talent on sports and news shows) amounted to an additional $5,497 million. Schink W.R.T. at 15; App. F (U.S. Census Bureau report); and App. A, Table A-3 (FCC Public Notice data used to estimate programming's share of payroll related costs and other expenses); Tr. 8591-93 (Schink).

429. Thus, in 1998, music license fees accounted for approximately ***2.33%*** of the expense category consisting of music licensing fees and broadcast rights and ***1.49%*** of total broadcast programming expenses. Schink W.R.T. at 16; App. F; App. A.[86] In conclusion, Dr. Schink testified that this would be the appropriate range within which to set the royalty share of the Music Claimants. Schink W.R.T. at 17.

430. The use of information on broadcast rights and programming expenses is directly relevant to the programming on cable signals because the content is becoming more and more similar. In the context of looking at relative values, if a program is worth a lot of payment for the right to broadcast it over the air, its relative value is likely to be similar for cable distribution. Tr. 8531-32 (Schink). In addition, the programming on distant signals looks a lot like the general entertainment cable network channels. Tr. 8678-79 (Schink).

[86] As he explained in his testimony and at the hearing, Dr. Schink used estimation techniques to do one small part of the calculation that resulted in this range. He estimated "other programming" costs applying ratios from 1980 to 1998 data. The rest of his calculations were based on published figures from reliable sources. Tr. 8591-92 (Schink).

431. Dr. Schink's calculations, unlike the calculations done by the CRT, included network programming music license fees and broadcast rights, despite the fact that network programming is not compensable in cable royalty distribution proceedings for the carriage of distant signals. This method, as opposed to that employed by the CRT in the past gives a better picture of the marketplace as a whole, in which program distinctions about commercial signals have largely disappeared. Schink W.R.T. at 14; Tr. 8566-68 (Schink). He was unable to locate data that would permit him to separate out just non-network music fees and rights payments, in part because the traditional and new networks distribute music license fees between networks and local stations on a different basis. Dr. Schink was able, however, to do a calculation for music license fees as a percentage of the total non-network programming expenses in 1980. For 1998, the result of that comparison would show that music license fees made up 2.14% of non-network programming expenses. Tr. 8737-39 (Schink).[87] He did not have the data to do a similar calculation just comparing music license fees to broadcast rights for 1998. This would require either attributing some programming costs from networks to the affiliates or attributing some of the music license fees of the local stations back to the networks. Adjustments would also have to be made for local advertising sales. Tr. 8751-53 (Schink). Schink concluded that the best view of the relationship for 1998 was to look at broadcast television in the aggregate, which would result in a "proper view of the relationship between music license fees and programming expenses." Tr. 8751 (Schink).

[87] In order to calculate this 2.14% figure, Dr. Schink compared the music license fees paid by stations to the total program expenses for stations. Tr. 8607-08 (Schink).

2. **Cable Network Programming**

432. Dr. Schink demonstrated that the cable networks' (including music intensive cable networks) 1998-99 music license fees will amount, on average, to ***2.07%*** of the cable networks' 1998-99 total programming expenses. Schink W.R.T. at 20 and App. H. Thus, the Music Claimants' estimated share of 1998-99 cable network program expenses falls within the 1.49% to 2.33% range produced by the analysis of commercial television broadcast programming expenditures.

433. Dr. Schink compared music licensing fees paid by cable networks with other programming costs incurred by cable networks. He did so by using the limited publicly available information on license fees paid by cable networks to either ASCAP or BMI with cable network program expenditure data obtained from Kagan Media, a source that has been relied on routinely in CRT and CARP proceedings. Schink W.R.T. at 18-20.

434. In 1999, ASCAP Rate Court interim fees for the premium channels MTV and The Country Music Channel were set at .7% of gross revenues, Tr. 8470 (Schink), and the interim fees for basic cable networks were generally set at .3% of gross revenues, although ESPN was paying less. Boyle Tr. at 4710-12, 4715-16, and 4734. The interim fee set for the Madison Square Garden sports cable network was set at .2% of revenue. Tr. 4757 (Boyle); NAB Demo Exhibit 13 (ASCAP Rate Court interim fee case for MSG). Final fees have also been negotiated or established by the rate court for pay cable services such as HBO. Tr. 4428-29, 4542-46, 4533-34, 4717-18 and 4989-92 (Boyle). BMI also had a 1998 licensing agreement with two music-intensive cable networks, Country Music Television and The Nashville Network, which provides for music licensing fees amounting to 0.9% of each network's revenues. Schink W.R.T. at 18 and App. G.

435. Based on the cable network license fee information available to him, Dr. Schink concluded that (1) the total 1998-99 music license fees paid by the music intensive cable networks will not exceed ***2%*** of these networks' revenues; (2) for general entertainment networks (such as USA, TNT and Discovery), the total 1998-99 music licensing fees paid will not exceed ***1%*** of these networks' revenues; and (3) the total 1998-99 music licensing fees paid by sports networks (such as ESPN) and news networks (such as CNN) will not exceed ***0.5%*** of these networks' revenues. Schink W.R.T. at 18 and App. H; Tr. 4728-49, 4756-59, 4768-70 (Boyle). For 1998, these rates imply that music license fees paid by the cable networks will amount to ***0.95%*** of their revenues. Schink W.R.T. at 19 and App. H, Table H-2. By way of comparison, the U.S. Census Bureau data show that commercial television paid approximately 0.7% of its 1998 revenues for music licensing fees. Schink W.R.T. at 19 and App. F at F-16.

436. Dr. Schink applied these cable network music license fee percentages to Kagan Media data on the program expenditures of 79 individual cable networks for which Kagan provided 1998 and 1999 program expenditures in order to determine the relative share of program expenses accounted for by music licensing fees.[88] Schink W.R.T. at 19 and App. H. Dr. Schink estimated that the cable networks' (including music intensive cable networks) 1998-99 music license fees will amount, on average, to ***2.07%*** of the cable networks' 1998-99 total programming expenses. The estimated 1998-99 music

[88] A small number of these cable channels have programming expenses that are greater than their revenues. Those cases, however, involve situations in which both the revenues and expenses are small and have little impact on the overall result. They are generally either spinoff networks, such as VH-1 Classic, or start-ups such as the Speed Channel. Tr. 8681-91 (Schink).

license fees for the major categories of cable networks as a percentage of their 1998-99 programming expenses are presented below:

Cable Network Music Licensing Fees Relative to Total Programming Expenses – 1998-99

Cable Networks Grouped by Type of Programming	1998-99 Music License Fees As a Percent of Total Programming Expenses
Music Intensive	5.20%
General Entertainment	2.44%
News and Public Information	1.31%
Sports	0.73%
All Programming Types	2.07%

Schink W.R.T. at 19-20 and App. H, Table H-1.

437. In sum, Dr. Schink found that had the Music Claimants negotiated in the marketplace over the right to perform musical works in distant signal programming retransmitted by cable operators during the years 1998 and 1999, the music license fee would have been within the range of 1.49% and 2.33% of the total royalties paid by cable operators for that distant signal programming. He thus determined that the zone of reasonable 1998-99 cable royalty shares for the Music Claimants' falls between ***1.49% and 2.33%*** of the relevant royalty funds. Schink W.R.T. at 17.

III. THE RELATIVE VALUE OF MUSIC'S RADIO CLAIM

438. The Music Claimants also assert a claim to a certain undetermined sum of royalties based on retransmissions of commercial radio signals by cable systems. The sole support for this claim is found in the testimony of Mr. Krupit, who provides copies of certain statements of account and public access channel licensing logs in supposed support

of these claims. *See* Krupit W.D.T. 10-11 and Exhibits 35 and 36; Tr. 4273-74 (Krupit). But at most these documents show that cable systems retransmit commercial radio stations.

439. There is no evidence anywhere in the record that any cable system carries commercial radio stations on a *distant* basis. Mr. Krupit was unaware that royalties were only paid for retransmissions of radio station signals beyond their local service areas, and he had done no analysis of whether any of the radio stations listed on the statements of account in Music Exhibit 35 were carried on a distant basis. Tr. 4321-4323 (Krupit). He was also unaware of whether any of the listed stations were public radio stations, talk radio stations, or sports radio stations. Tr. 4319 (Krupit). Mr. Krupit agreed that it was impossible to tell from the licensing logs in Music Exhibit 36 whether radio stations were even providing the music. Tr. 4326-27 (Krupit).

440. Nor is there any evidence in the record to quantify the marketplace value of any such retransmissions – if they exist – or to allocate a royalty share to the Music Claimants on that basis. Mr. Krupit was not even aware that cable stations pay no additional royalties for the carriage of radio stations. Tr. 4362-63 (Krupit). With no evidence, Music cannot be awarded royalties on the basis of hypothetical, unquantified distant radio retransmissions of no demonstrated value. The Music Claimants concede that their past awards included some amount for distant retransmission of commercial radio signals, although that amount may be small and unquantifiable. Krupit W.D.T at 10-11. They have not made a showing in this proceeding that they are entitled to any award on this basis.

IV. SHARE OF MUSIC ROYALTY ATTRIBUTABLE TO JSC

A. Allocation Using Royalty Shares of Non-Music Claimants

441. In the 1990-92 proceeding, the Music Claimants' settlement share was taken "off the top," and was thus effectively allocated among the other claimants according to those claimants' pre-allocation shares of the pool. Schink W.R.T. at 20-21. JSC thus contributed approximately 30% of the Music Claimants' 1990-92 royalties from its allocated royalty share, or 1.35 percentage points of the 4.5 percentage points allocated to Music (4.5 x 0.30).

442. This procedure of taking the Music Claimants' share "off the top" of the royalty funds for 1998-99 takes a disproportionate amount from JSC. Schink W.R.T. at 21. As conceded by the Music Claimants' witnesses, the Music Study demonstrates that the use of music in sports programming is less than in the programming of other non-music claimants. Tr. 4627-28 (Boyle). Furthermore, Dr. Boyle acknowledged that in marketplace negotiations, the Music Claimants generally seek and obtain lower royalties from sports programming services than from general entertainment services. Boyle Tr. 4590-4606, 4627-28, 4715-16, and 4762-4768.

B. JSC Portion of Music Award

443. Dr. Schink calculated the portion of the Music Claimants' royalty award attributable to JSC by using two separate approaches.

1. Music Use Approach

444. Dr. Schink's first approach focused on music use. He considered the amount of music played per program hour in sports programming relative to the minutes of music played per program hour in other programming. *See* Schink W.R.T. at 21-23.

445. None of the 1991-92 matched cue sheets in the Music Study, and only eight of the 1998-99 matched cue sheets, involved sports programming. Tr. 4353-54 (Krupit). These cue sheets for 1998-99 showed that a typical sports program had ***3.2*** minutes of music per hour relative to the ***22.0*** minutes of music per hour on average claimed by Dr. Boyle for all programming. Schink W.R.T. at 22; Tr. 8454 (Schink); JSC Exhibit 33-X (copies of cue sheets for JSC programs). Mr. Krupit agreed that the eight cue sheets for JSC programs – including those that reflected 6.25 minutes of music in a three-hour game and 13.68 minutes of music in a 2.3 hour game – accurately demonstrated the way music is reported on cue sheets received for sports programming. Tr. 4353-55 (Krupit). The observation that music minutes were lower for sports programming was confirmed by Dr. Boyle's repeated statements that ASCAP would expect to obtain a lower percentage of revenue music license fee from sports programming services than from general entertainment programming services because of the lower use of music by sports programming. Tr. 4597-4600, 4715-16, 4758-4759, 4761-4768 (Boyle).

446. Based on the relative amount of music use per hour of sports programming, the JSC allocation would be ***0.145*** percentage points for every 1.0 percentage point allocated to other programming (this calculation reflects the ratio of 3.2 to 22.0). Schink W.R.T. at 22. Thus, in 1990-92, where JSC had a 30% share before taking account of the Music Claimants' 4.5% award, JSC's share would have been reduced by ***5.85%*** of the 4.5%, or ***0.263*** percentage points, to account for the Music Claimants' award – rather than, as noted above, the 1.35 percentage points by which the JSC's pre-allocation share was actually reduced. Schink W.R.T. at 22-23.

447. The 5.85% is calculated by taking (a) JSC's pre- music allocation share of approximately 30% multiplied by (b) (0.145), then dividing that sum by (c) the sum of pre-music allocation sports and non-sports shares each weighted (multiplied) by their respective music intensities (i.e., 30% weighted by 0.145 for the JSC and 70% weighted by 1.0 for the other non-Music Claimants). The calculation is as follows: $0.0585 = (30 * 0.145) / (30 * 0.145 + 70 * 1.0)$. Schink W.R.T. at 23 n.28.

448. The same calculation can be done for the JSC 1998-99 share based on the results of the Bortz study. The JSC pre-allocation Bortz shares of the 1998 and 1999 royalties are 36.6% and 38.3%, respectively. Trautman W.R.T at 8, Table 3. The fraction of Music's award that should be allocated to the JSC for 1998 and 1999 is thus shown in the following table:

Year	JSC Bortz Share	JSC Share of Music Award
1998	36.6%	7.72%
1999	38.3%	8.26%

See Schink W.R.T. at 23 n. 28.[89] Assuming a 2% award to the Music Claimants, this would result in a deduction of 0.15 percentage points of the pre-music JSC allocation from the 1998 Bortz share and 0.17 percentage points of the pre-music JSC allocation from the 1999 Bortz share (7.72% of 2% for 1998, and 8.26% of 2% for 1999). The final JSC shares after the deduction of JSC's share of the Music Claimants' award would be as follows:

Year	JSC Final Shares
1998	36.45%
1999	38.13%

2. **License Fee Comparison Approach**

449. Dr. Schink also considered the license fees charged to cable sports networks relative to the music license fees charged to other cable networks as a percentage of their total programming costs. *See* Schink W.R.T. at 23-25. The results of calculating the music license fees as a percentage of total programming costs for the sports cable networks and for the other cable networks (excluding the music intensive cable networks for which there are no equivalent distant signal stations) for 1998-99 demonstrate that a much smaller share of sports cable network programming expenses are devoted to music fees than is the case for the non-sports networks excluding music-intensive cable networks. The weighted average of music license fees for each type of cable network programming is shown below:

Footnote continued from previous page

[89] These figures are calculated by the application of Dr. Schink's formula to the Bortz shares for 1998 and 1999. For 1998: (36.6∗ 0.145) / (36.6∗ 0.145 + 63.4 ∗ 1.0) = 0.0772. For 1999: (38.3∗ 0.145) / (39∗ 0.145 + 61.7 ∗ 1.0) = 0.0826.

1998-99 Cable Network Music License Fees
As A Percent of Programming Costs:
Sports Networks vs. Non-Sports Networks Excluding Music-Intensive Networks

Type of Cable Network Programming	1998-99 Music License Fees As a Percent of Total Programming Expenses
Sports Networks	0.73%
Non-Sports Networks Excluding Music-Intensive Networks	2.26%

Schink W.R.T. at 23-24 and App. H, Table H-1.

450. The ratio of these percentages illustrates that a much smaller share of sports cable network programming expenses are devoted to music fees than is the case for the non-sports networks excluding music-intensive cable networks. This smaller share is consistent with the fact that less music is used during sports programming than during other programming. Based on the cable networks data above, JSC's allocation of the music award would be 0.323 percentage points for every 1.0 percentage point allocated to other (non-sports excluding music-intensive) programming (this calculation reflects the ratio of 0.73% to 2.26%).

451. JSC's share of the Music Claimants' award can be calculated under this license fee comparison approach using the same formula discussed above under Dr. Schink's cable network approach. The fraction of the Music Claimants' award that should be allocated to the JSC for 1998 and 1999 is thus shown in the following table:

Year	JSC Bortz Share	JSC Share of Music Award
1998	36.6%	15.72%
1999	38.3%	16.70%

See Schink W.R.T. at 23 n.28.[90] Assuming a 2% award to the Music Claimants, this would result in a deduction of 0.31 percentage points of the pre-music JSC allocation from the 1998 Bortz share and 0.33 percentage points of the pre-music JSC allocation from the 1999 Bortz share (15.72% of 2% for 1998, and 16.70% of 2% for 1999). Under the license fee comparison approach, the final JSC shares after the deduction of JSC's share of the Music Claimants' award would be as follows:

Year	JSC Final Shares
1998	36.29%
1999	37.97%

452. The final post-music allocation JSC shares for 1998-99 can be derived by combining Dr. Schink's two approaches. Under these approaches, assuming that JSC receive a royalty allocation of its Bortz shares for 1998 and 1999 and that Music receives a royalty allocation of 2% of the Basic fund, the range of percentages of JSC's share of the Music Claimants' award would be 7.72% - 15.72% for 1998, and 8.26% - 16.70% for 1999. JSC recommend that their final share be calculated using the midpoints of these

[90] These figures are calculated by the application of Dr. Schink's formula to the Bortz shares for 1998 and 1999. For 1998: (36.6* 0.323) / (36.6* 0.323 + 63.4 * 1.0) = 0.1572. For 1999: (38.3 * 0.323) / (38.3* 0.323 + 61.7 * 1.0) = 0.1670.

ranges. Thus, the JSC percentage share of the Music Claimants' award at the midpoint for each year is about 11.7% for 1998 and 12.5% for 1999. The JSC share of the Music Claimants' award would be about 0.2 percentage points for 1998 and 0.3 percentage points for 1999 (11.7% of 2% for 1998, and 12.5% of 2% for 1999, rounded to the nearest tenth). Applying Dr. Schink's methodology, 0.2 percentage points would be deducted from the JSC pre-music allocation share for 1998, and 0.3 percentage points would be deducted from the JSC pre-music allocation for 1999 as the JSC share of the Music Claimants' award. The JSC pre-music allocation awards of the Basic fund for 1998-99 would thus be reduced by that amount to yield the following final, post-music allocation JSC awards:

Year	**JSC Bortz Share**	**Final JSC Post-Music Allocation Award**
1998	36.6%	36.4%
1999	38.3%	38.0%

Respectfully Submitted,

Robert Alan Garrett /cw

Robert Alan Garrett
James L. Cooper
Christopher Winters
Michele T. Dunlop

ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004-1206
(202) 942-5000

Of Counsel:

Thomas J. Ostertag
Senior Vice President and General Counsel
Office of the Commissioner of Baseball
245 Park Avenue
New York, NY 10167

Philip R. Hochberg
Piper Rudnick
901 Fifteenth Street, N.W.
Suite 700
Washington, DC 20005

Ritchie T. Thomas
Squire, Sanders & Dempsey LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

August 20, 2003

CERTIFICATE OF SERVICE
Docket No. 2001-8 CARP CD 98-99

I hereby certify that copies of the foregoing Proposed Findings of Fact and Conclusions of Law of the Joint Sports Claimants was sent on August 20, 2003, by hand delivery and overnight mail, to the following parties:

Timothy C. Hester Ronald G. Dove, Jr. Covington & Burling 1201 Pennsylvania Avenue, N.W. Washington, DC 20044-7566 ***Counsel for Public Television Claimants***	Joan M. McGivern Samuel Mosenkis ASCAP One Lincoln Plaza New York, New York 10023
Paul Greco Public Broadcasting Service 1320 Braddock Place Alexandria, Virginia 22314 **c/o Covington & Burling**	I. Fred Koenigsberg Carol A. Witschel Stefan M. Mentzer White & Case 1155 Avenue of the Americas New York, New York 10036-2787 ***Counsel for American Society of Composers, Authors and Publishers***
Gregory Olaniran Michael E. Tucci Robert L. Eskay, Jr. Stinson Morrison Hecker LLP 1150 18th Street, N.W. Suite 800 Washington, DC 20036-3816 ***Counsel for Program Suppliers***	Marvin Berenson Joseph J. DiMona Broadcast Music, Inc. 320 West 57th Street New York, New York 10019 **c/o Drinker Biddle & Reath**
L. Kendall Satterfield Richard M. Volin Finkelstein, Thompson & Loughran 1050 30th Street, N.W. Washington, DC 20007 ***Counsel for Canadian Claimants Group***	Michael J. Remington Philip J. Mause Jeffrey J. Lopez Drinker, Biddle & Reath LLP 1500 K Street, N.W. – Suite 1100 Washington, DC 20005 ***Counsel for Broadcast Music, Inc.***
Henry L. Baumann Benjamin F.P. Ivins National Association of Broadcasters 1771 N Street, N.W. Washington, DC 20036 ***Of Counsel for National Association of Broadcasters*** **c/o Crowell & Moring**	Patrick Collins SESAC, Inc. 55 Music Square East Nashville, Tennessee 37023

John I. Stewart, Jr. Karen C. Herman Parul Desai Valerie Hinko Michael Lazarus Crowell & Moring LLP 1001 Pennsylvania Avenue, N.W. Washington, DC 20004 ***Counsel for National Association of Broadcasters***	John C. Beiter Loeb & Loeb, LLP 45 Music Square West Nashville, Tennessee 37203 ***Counsel for SESAC, Inc.***

Daniel Lee